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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 443

HARLEY A. SEYBOLD, WALTER S. YOUNG, CHARLES E. KLUEGEL, MILO S. BUCK, W. O. OLIVER and ARCHIE B. CALLENDER,

Petitioners,

vs.

WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and the BANKERS TRUST COMPANY,

Respondents.

HARRY C. BORDWELL,

Petitioner,

vs.

ILLINOIS BELL TELEPHONE COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and the BANKERS TRUST COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Harley A. Seybold, Walter S. Young, Charles E. Kluegel, Milo S. Buck, W. O. Oliver and Archie B. Calender and Harry C. Bordwell, pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

OPINIONS BELOW.

The Opinion of the District Court is reported at 136 F. Supp. 125 and appears at pp. 173-222 of the Record. The Opinion of the Court of Appeals is reported at 234 F. 2d 942. It is set forth in Appendix A, *infra* pp. 40-48.

JURISDICTION.

The judgment of the Court of Appeals was entered the 27th day of June, 1956. The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED.

1. Is the offset of OASI against Bell pensions a "transfer" within the meaning of 42 U.S.C. § 407?
2. Does a contract which provides for decreasing the amount of a pension previously granted solely because of an increase in OASI impair Congressional power to legislate effectively on Social Security?
3. Is OASI "payable" to a retired individual during the period when he is disqualified by Section 403 of the Social Security Act from receiving any OASI because of earnings in covered employment?
4. Does OASI duplicate the purposes of the Bell Pension Plan?
5. Is there authority in the Bell Pension Plan to redetermine the amount of OASI offset during the retirement of the pensioner?
6. Does the differential and more favorable treatment given by the 1952 amendment of the Bell Pension Plan to still active employees as compared with pensioners violate a duty of non-discrimination?
7. Are these proceedings real class suits? (This point is reserved in the event certiorari is granted)

STATUTES INVOLVED.

The issues here involve the interpretation of 42 U.S.C. §407, 42 U.S.C. § 402(a), and U.S.C. § 403(b). These are set forth in Appendix, B. *infra* pp. 49, 50.

STATEMENT.

1. *The Facts.* Both Complaints are against the defendants' practice of deducting one-half of Social Security Old Age and Survivors' Insurance (OASI) received by Bell pensioners from the full amount of pensions payable under the basic Bell pension formula. Each of the cases was brought by retired employees against component companies of the Bell system and the Bankers' Trust Company, Trustee of the Bell pension funds. Federal jurisdiction was based on 28 U.S.C. § 1331. Both cases were filed as class suits and were consolidated below.

The pension plans of all companies in the Bell system are virtually identical.[1] They are referred to collectively as the "Bell Plan". The Bell Plan provides for the payment of a service pension to employees who retire upon reaching one of several combinations of age and years of service—*e.g.*, 60 years of age and 20 years of service for male employees. The formula for determining the amount of the pension (Section 4) is 1 per cent of the average annual pay for ten highest paid consecutive years multiplied by the number of years of employment. The formula has been the same throughout the history of the Plan.

Administration of the Plan within each company is vested in the Employees' Benefit Committee, which is composed of five members appointed by the Board of Directors. Representatives of the employees do not serve on the Committee.

Neither the Plan nor any of the changes in it have been adopted as a result of collective bargaining.

[1] Copies of the Bell Pension Plan are contained in "Defendants Exhibit Appendix", Documents 1-3, which has been certified by the Clerk of the Court of Appeals and has been forwarded (1 copy) with this petition.

The provision of the Plan which is at the heart of the controversy is the first sentence of Section 8 (27), which between 1914 and 1940 read as follows:

> "In case any benefit or pension shall be payable under the laws now in force or hereafter enacted of any State or Country to any employee of the Company or his beneficiaries under such laws, the excess only, if any, of the amount of such benefit or pension prescribed in these Regulations above the amount of such benefit or pension prescribed by law shall be the benefit or pension payable under these Regulations."

In November 1936, after the passage of the Social Security Act the defendants notified their employees that:

> "No change is contemplated in the Plan on account of the Federal Social Security Act of 1935 except that if the Act shall remain in effect unchanged until 1942, when payment of Government Pensions begins under the Act, it is expected that the provision now in the Plan that all of the pension paid by the Government shall be deducted from pension otherwise payable under the Plan will be changed to provide that only one-half the pension paid by the Government under the Act shall be deducted." (Def. Ex. 1, 6, 9).

Congress enacted the "Social Security Act Amendments" of 1939," advancing the date for starting old age insurance payments from 1942 to 1940. The defendants thereupon proceeded to put their 1936 announcement into effect by amending their pension plans, effective January 1, 1940. The amendment inserted after the first sentence of § 8 (27), the phrase "except as provided in paragraph 28 of this Section." Paragraph 28, which followed, specifically provided for the deduction from any service pension of one-half of the OASI received by the pensioner under the Social Security Act of 1939.

In 1949 it was evident that Congress would pass another amendment to the Social Security Act, increasing the

levels of OASI payments. The sharp rise of prices during the decade 1940-1949 had seriously impaired the purchasing power of all Social Security payments. In anticipation of the action by Congress, the defendants in November, 1949, again amended § 8 (28) of their Pension Plan so that plaintiffs pensions were reduced by one-half of the increase in their OASI resulting from the Social Security Act amendment of 1950.

The effect of this 1950 action upon the bulk of Bell System pensioners is illustrated by the experience of typical non-supervisory employees such as the following plaintiffs: (R. 172)

Name	Earned pension under sec. 4	Net pension after original OASI deduction	Pension after 2nd or 1950 deduction	Time Empld Yrs-mos
Seybold	$65.54	$57.04	$33.30	24-10
Young	106.86	85.52	73.61	39-3
Buck	90.72	69.12	57.27	34-10
Callendar	103.88	82.34	70.48	44-3

Thereafter the cost of living having again risen very sharply in the intervening period as a result of the Korean War, Congress in 1952 again increased the levels of old age insurance benefits. Plaintiffs then instituted preliminary injunction proceedings to prevent further reduction in pensions, and, pending an appeal from the denial of such relief by the trial court, the Bell system amended its Pension Plan so as to provide that the Social Security offset against Company pensions should be determined once and for all at the time of a pensioners retirement and that his Company pension so determined should be thereafter immune to any further change as a result of increases in Social Security. (R. 11-13, 20, 21) This recognition of the

principle of vested rights on retirement was subject to one qualification. It excluded from its full benefits the class of pensioners represented in this suit, who retired prior to the Social Security Act amendments of 1950. As to them, the Social Security offset was to be calculated not on the basis of the amount of Social Security benefit payable on the pensioner's retirement but on the basis of such benefit under the Social Security Act of 1950. These now constitute the only class of Bell pensioners whose offset as fixed on retirement has been increased *after retirement.*

Although the defendants have asserted the right to offset Social Security benefits payable to the pensioner against his Company pension, they have refused to discontinue this offset when OASI ceased to be payable to the Bell pensioner upon his taking covered employment under 42 U.S.C.A. § 403. Eligibility for OASI and not actual receipt is the basis of the Bell offset practice. The parties have stipulated (R. 170) that this is the policy of the defendants.

2. *The Decision of the Court of Appeals.* The trial court dismissed the Complaints. The Court of Appeals, in affirming the judgment, explicitly adopted the reasoning of the trial court on all of the points involved and stated that no helpful purpose would be served by reconsidering the plaintiff's arguments in its opinion. It will therefore be necessary to deal with the reasoning of the trial court as the expression of the views of the Court of Appeals on each of the issues.

REASONS FOR THE ALLOWANCE OF THE WRIT.

I. THE COURT OF APPEALS HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This case is the first occasion for the courts of the United States to consider the legal problems arising out of the adjustment of industrial retirement plans to Social Security; and in particular that specific form of accommodation known as the "offset" device.

The practice of explicitly incorporating OASI as an integral part of private plans was widely adopted after the Social Security law was enacted. There are different forms of such integration. In some plans the amount of wages "covered" by Social Security is given a differential treatment in figuring pension credits. In others, OASI is deductible from an amount of retirement income stated in the plan-so called "offset integration". In this respect the Bell plan differs from post-1935 offset plans in one important particular. These have built upon the existence of Social Security as an accomplished fact and the formula for determining the benefits therefore lumped both OASI and service pension together, stating them as an aggregate retirement income. In such plans the offset of OASI does not take place by subtraction from the service pension but from a calculated aggregate which includes both; whereas in the Bell plan the subtraction is from the service pension alone, from an amount of pension obligation which, but for the receipt of OASI, would have been payable according to the service pension formula without deduction.

It is when we get to the effect of offsetting the legislative increases in OASI that all offset plans present the same problems. In the post-1935 calculated aggregate

plans, the assumption had necessarily to be made at the inception of each plan, that the then current level of OASI benefits would continue unchanged. The effect of the OASI increases under later Congressional acts was therefore the deduction of a larger sum than that originally allowed for OASI in calculating the stated aggregate benefit, and the offset of the OASI increase therefore unavoidably took place from the amount originally calculated for service pension alone. The series of legislative increases in OASI, starting 1950, has therefore had a shattering effect upon offset plans in general, and the trend in American industry has been toward a progressive abandonment of the offset practice. Many large corporations with offset plans have sought a compromise by offsetting OASI at retirement but not any OASI increases thereafter. (R. 154) Others have found that the offset practice in any form strikes at the root of good employer-employee relationships; and some leading companies, notably Ford, General Motors, duPont, and the Steel industry as a whole in their recently revised plans have adopted pension formulas providing a flat benefit for each year of credited service independent (except in minor respects) of Social Security payments.[1] Summing up the effect of the OASI increase on pension practice, an authority has said that "the Social Security Act of 1954 sounded the death knell of the offset plan".[2]

The defendants not only offset OASI at retirement; after the enactment of the 1950 Act they decreased service pensions previous granted by half of the OASI increase.

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[1] The trend towards such non-integrated pension formulas is admitted by one of the defendants, Bankers Trust Co. in its "Study of Industrial Retirement Plans," 1956. (p. 17).

[2] Prentice-Hall, "Pensions and Profit Sharing". § 2512.

Considering that the Bell plan alone covers more than a half-million employees it is a matter of great public importance to settle the law on the propriety of all of the offset practices of the Bell system. The immediate practical impact of these issues has been underlined by the Social Security Act of 1956 in advancing the age of entitlement to OASI from 65 to 62 for women (who constitute the majority of Bell pensioners). One half of this benefit will be lost at once by such women pensioners under 65 through an offset against their Bell pension.

A. Is the offset a "transfer" of the economic benefits of OASI, in violation of 42 U.S.C. 407?

Social Security benefits go by check directly to the insured worker and none of it is paid to the defendants. But if the receipt of the Social Security benefit by a Bell pensioner is contractually made the ground for a proportionate reduction in the amount which, but for the payment of Social Security, would otherwise be due from the defendants on the contract obligation, then such a consequent reduction of the stated amount due shifts *pro tanto* the *economic benefit* of the Social Security payment. It is precisely this shift of economic benefit which is the evil sought to be prevented by the transfer prohibition of § 407. If an employer required a pensioner to turn over his Social Security check as a condition of paying the Company pension, no one would have the least doubt that this was a gross violation of the transfer provisions of the Social Security law. Is there any difference in the economic result to the worker between doing that and letting him keep his OASI check but making the sole fact of its receipt the sufficient ground for an automatic, proportionate reduction in the amount of a Company pension which would otherwise, but for the receipt of OASI, have been payable in full? To the pocket book of the worker, the effect of both

transactions is precisely the same. In each, there is the same quantitative shift of the economic benefit of the Social Security payment, and therefore, in the one as in the other, there is a "transfer" within § 407 of the Statute.

The benefit lost to the pensioner from the offset of OASI against Company pension accrues to the defendants in a corresponding decrease of their obligation to the pension fund. It is conceded that the actuarial reserve as well as the rate of payroll accrual for pension purposes of the defendants' pension funds have been decreased by the OASI offset substantially below the amounts and rates which the defendants would otherwise, in the absence of of the offset, have been obligated to meet. The trial judge summed up the record on this point as follows:

> "As the Chief Actuary of AT&T testified, however, the offsetting of OASI benefits reduced the pension accruals and the rate of accrual below what they would have been without Social Security deductions." (R. 198).
>
> "It is conceded that the plaintiffs' service pensions were reduced after passage of the Social Security Act and that the defendants' obligations were also reduced by reason of its enactment." (R. 198).

The economic interest transferred from the pensioners by the offset accrued to the defendants in the form of a corresponding decrease in their contractual obligations to their pension funds.

When Congress forbade the voluntary or involuntary alienation of Social Security benefits, it was for the protection of the worker's economic interest against all hazards. The maintenance intact of this interest (*U. S.* v. *Silk*, 331 U.S. 704, 712; *Social Security Board* v. *Nierotko*, 327 U.S. 358) is the object of legislative policy. It is the *economic* benefit of Social Security which is at the heart of § 407 and it is in terms of protection to those benefits that we

must construe the provision. This is a field, par excellence, where we should consider economic and social realities, which are the substance of which the legal transaction is but the form.[1] From this viewpoint a transfer in law is essentially what it is in the domain of practical affairs—a shift of economic benefit. This emphasis upon the shift of economic interest in interpreting the legal concept of transfer, has been emphasized by the Supreme Court as an expression of judicial realism.

> "When the gift tax was enacted Congress was aware that the essence of a transfer is the passage of control over the economic benefits of property rather than any technical changes in its title." *Estate of Sanford* v. *Com.*, 308 U.S. 39, 42, 43.

In *Burnet* v. *Guggenheim*, 288 U.S. 280, there was a transfer in trust subject to power to modify, alter or revoke the gifts. This power was eliminated from the deeds in 1925. In the meantime in 1924 Congress began to tax transfers by gift and the question was whether the transfer had taken place in 1917 when title passed or in 1925 when the donor's power was extinguished. The court held the transfer took place in 1925. The argument of the taxpayer was that Congress in laying a tax upon transfer by gift had in mind the passing of title, that it was thinking of transfers in the technical, not in the economic sense. The Court decided otherwise and stated:

> "Taxation is not so much concerned with refinements of title as it is with the actual command over the property taxed—the actual benefit for which the tax is paid." p. 283.
>
> "It is command of income and its benefits which marks the real owner of property." *Higgins* v. *Smith*, 308 U.S. 473, 478.

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[1] In interpreting the National Labor Relations Act "we concluded that . . . 'employees' included workers who were such as a matter of economic reality." *U.S.* v. *Silk*, p. 713.

These cases are taken from the field of taxation, but the same realistic approach to the economic substance of the transaction rather than its form ought to be followed in other fields of legislative policy. And nowhere is this more necessary than in the interpretation of the Social Security Statute, which, as the Courts have repeatedly emphasized, has a large social, remedial purpose and should be liberally construed in defense of the economic interests of the retired workers. *U.S.* v. *Silk,* 331 U.S. 704; *Broderick* v. *Squire,* 163 Fed. 2d 980, 982.

But, say the defendants, we have paid for half of the Social Security benefit in the form of payroll taxes and we are only offsetting what we ourselves have paid for. As the Secretary of the defendants' Employees Benefit Committee put it in a letter to a pensioner:

> "The Company has provided half the cost and therefore is entitled to be reimbursed for the same proportion of the benefits." Pfs. App. p. 35, Pfs. Ex. 96.

Here we have the heart of the misconception on which the defendants base their offset practice. Because they pay for half of OASI *it does not follow that they may share the benefits.* Social Security benefits, though paid for equally by both employer and employee, are for the exclusive financial advantage of the employee, and his dependents. These benefits cannot be taken from him directly; nor can he be deprived of them indirectly by a tie-in deal where the receipt of OASI automatically decreases what would otherwise be payable to him out of another fund.

The trial court and Court of Appeals have not met this basic contention. They have not denied that to define the amount of a contract obligation by reference to the receipt of a government benefit payment so as to reduce the amount of obligation by all or part of the amount of

such payment *necessarily* shifts the economic benefit from the recipient designated by the statute. Let us briefly review the main points on which they relied:

1.) The trial judge admits that the offset shifts the economic benefit of OASI to the employer, (R. 198, 209) but says that this does not signify because the prohibition in § 407 of the Statute is directed solely at voluntary assignments, relying squarely on the dictum in *Gardner* v. *Ewing*, 88 F. Supp. 315. (R. 198) That case involved neither a transfer nor an assignment but the succession by an administrator to the estate of his decedent by operation of law. The court held that such a succession is neither a transfer nor an assignment. There was no proper occasion for the court to go further and state that the transfer prohibition was aimed at nothing more than voluntary assignments. The defendants, themselves, claimed no more than a limited significance for the case. The court does not explain why, if Congress aimed only at voluntary assignments, the statutory prohibition was couched in the disjunctive ". . . shall not be transferable *or* assignable".

2.) The basic rationalization of the trial court is that:

> "There is nothing in the Social Security Act or in its legislative history to show that Congress intended to establish standards of validity or invalidity for private pension plans." (R. 199).

Even if this were true, it is irrelevant. Of course, in the Social Security Act Congress was legislating only on the subject of Social Security. But in doing so it sought to protect the beneficiaries of the Social Security System from *any* conduct of others which by any legal device would alienate the Social Security beneficiary from the substance of his insurance benefit. To that extent, Congress was legislating limits not only for private retirement plans, but for any other contracts. The failure of the Social Security Act specifically to forbid the offset of

OASI against private pensions therefore does not signify. The Act specifically forbids transfers; and if the basic proposition is accepted that a transfer is a shift of economic benefit, then the offset must be condemned because it effects such a shift. To be unlawful it is enough that an act can properly be subsumed under the general concepts in which the statutory prohibition is expressed.

3.) Considering the trial court's admission that the effect of the offset is a displacement of the economic benefit of OASI from the pensioner to the employer (R. 198, 209), the resulting presumption of illegality can be met only by a strong affirmative showing that Congress debated and approved the practice but failed, whether by design or inadvertence, to say so. The trial court has therefore argued (R. 199) that Congress anticipated and approved offset integration of Social Security with industrial pensions in passing the Social Security Act of 1935. What proof has been offered in support of this assertion? The Social Security Act was one of the most important items of legislation in recent decades. Its passage through the committees and the houses of Congress was attended by long debate. There was some discussion that its enactment might lead to the abandonment of industrial pension plans; and assurances were given by proponents of the bill that it would not in any way prevent employers from continuing with their private plans. (R. 199). But it is certain that Congress never debated the offset system. No Committee Report discussed or reported the subject. The defendants' diligence has been rewarded with a single casual reference to the "offset" by a witness before the House Committee in 1935 (R. 200). On the basis of this insignificant item, the trial court was able to make the confident assertion (R. 199) that Congress was fully informed of the offset device, and deliberately legislated the Social Security Act of 1935 in the light

of that detailed knowledge. If Congress had any thought of approving the offset that purpose has never been expressed. The trial court has nevertheless given effect to this supposed, unexpressed intention as an undoubted fact and has made it the basis for its whole construction of the statute.

The court therefore altogether misconceived (R. 200) the significance of the absence of a reference to private pension practices in the Act and drew precisely the wrong conclusions from it. Such silence cannot prejudice the plaintiffs because a specific act can be construed without logical difficulty to come within the scope of a general prohibition. But for the defendants the failure of Congress specifically to approve the offset practice must be disastrous. For they start with the burden of the court's admission that the offset shifts the economic benefit of OASI and they can hope to avoid the resulting implication of illegality only by positive proof of Congressional approval. No such proof has been or can be made.

4.) It has been urged that Congress could not have intended the offset practice to be prohibited as an unlawful transfer because under I.R.C. 401 and the administrative regulations issued under it, Cum. Bull. 6641.15, Congress removed the disability on offset plans as being discriminatory *per se* and thereby enabled offset plans to enjoy the same tax advantages as other pension plans. The removal of a particular disability upon a practice in one statute does not justify an inference that Congress was legislating a general immunity for that practice under all other statutes. If the Department of State issued a regulation under the Internal Security Law removing the disqualification of Communists in receiving passports, and Congress later re-enacted the statute, would that constitute "affirmative Congressional approval" of membership in the Communist party? Would it be a Congressional in-

terpretation of the Smith Act? If both 42 U.S.C. 407 and I.R.C. 401 had language in common, then the interpretation of the one would be highly persuasive in the interpretation of the other. But that is not the case. If I.R.C. 401 used the concept of "transfer", its interpretation by a Treasury Regulation might be relevant to the meaning of the same term here. But that is not the case. If the point at issue here were that the Bell Pension Plan discriminated in favor of higher-paid employees, then the interpretation of "discrimination" in I.R.C. 401 might be relevant here. But that is not the case. It is perfectly possible for the offset to be non-discriminatory as between higher and lower-paid employees and still be an unlawful transfer as to *all* employees. The removal in I.R.C. 401 of the disqualification of offset plans as *per se* discriminatory therefore does not signify. We are concerned here with the interpretation of a totally different concept.

5.) The Court of Appeals adopted the reasoning *in toto* of the trial court on the "transfer" issue and added one short paragraph of its own. (A. pp. 46, 47). We are unable definitely to interpret that statement. It appears to be said that the offset device is a means of avoiding the added burden of the Social Security payroll tax which otherwise would have imposed on defendants "a greater economic burden than that which they voluntarily assumed". The implication of this statement is extraordinary. It is that a citizen has the power to decide for himself whether he chooses to submit to the added burden of a tax. Any employer wishing to continue his private plan after the Social Security law was enacted could have done so and continued to receive the same benefits in greater business efficiency, as before, from his private plan. As the defendants themselves have openly stated, (Pls. Ex. 93) their pension plan was worth more to them than the money it cost; and presumably they decided

to keep it for the same business reasons after the Social Security law was passed. Is it reasonable that they should continue thereafter to reap all of these particular benefits of their private plan and in effect be permitted to decrease their usual cost therefor by crediting it with part of the excise tax they are required to pay for the purposes of government? Employers without pension plans in 1935 had to pay the full additional burden of the tax without getting any of the business benefits of a private retirement plan. To permit the defendant to continue enjoying the full use of their private plan and yet to offset their excise tax against the usual cost of financing the business benefits of their plan is to relieve the defendants of the additional tax burden intended to be placed equally upon all employers without exception.

May an employer who enters into a contract with his employees to pay them a deferred wage in the form of a pension on retirement, and who receives a full quid for the money he pays into the pension trust, contract out of the burden imposed by a future generation upon all industry in legislating a great measure of social reform? The Court of Appeals believes that it disposes of the problem by saying that the result was in accordance with the defendants' original intention in 1913. But the defendants' intention is merely the starting point of the inquiry. Granted for the moment that such an intention existed and could fairly be said to apply to payments such as OASI, is such an intention enforceable when it shifts the economic benefit of a statutory payment away from its proper beneficiary and thereby shifts to them the employers statutory burden of supporting the Social Security system? And that, in the face of an explicit prohibition against transfers in § 407? The Court of Appeals uneasily acknowledges that an unresolved problem exists here. But it says that this only "poses a problem within the realm of moral evaluation,

not legal." The flight into morals is an easy escape from the difficulties of statutory interpretation, but it is not a solution that is open to a court of law.

B. Is the offset of the 1950 increase in OASI an interference by the employer with the action of Congress in providing a legislative remedy on a subject within its Constitutional power?

The plaintiffs, retired between 1941 and 1950, received service pensions based on their wages during the last ten years of employment—on the average, say, from 1935 to 1945. These wage levels, already abnormally low (the average wage of Bell non-supervisory employees was $25.09 in 1939) were then stabilized by law during the war years 1940-1945. The rapid increase in prices during the post-war period therefore created special difficulties for these small pensioners, whipsawed on the one hand by the fixed low pensions based on depression wage levels, and on the other by increasing living costs. To correct this evil Congress legislated the Act of 1950 which increased OASI payments. Half of this increase was thereupon immediately offset against the service pensions of Bell pensioners already retired. To the extent of the offset of OASI increases, it was the employer with offset plans, and not the retired worker, who was the beneficiary of the Social Security Act of 1950. One of the principle contentions of the plaintiffs in this case is that this offset of the Social Security increases in 1950 frustrated the intention of Congress to legislate a remedy for the effects of inflation on the purchasing power of Social Security benefits, an evil which threatened the essential purpose of the Social Security System. If a measure of relief granted by Congress, in order to compensate for the loss of purchasing power of OASI benefits during a period of rising prices, is made the contractual ground for

an automatic reduction in the amount of the employers' obligation to the OASI recipient, then such a contract and such a practice deprives Congress of effective ability to legislate a remedy for a mischief within the reach of its Constitutional power.

Most of the large corporations with offset plans decided not to offset OASI increases (R. 154). But the significant point is that the power of decision as to whether the Congressional relief should go to their pensioners under their offset plans was entirely in the hands of the employers. The business manager in 1950 sat in judgment upon the action of Congress and determined for himself whether, so far as the pensioners of his own company were concerned, the increases in OASI would go to the proper objects of Congressional relief, or into his own pocket. Congress by its own action was without effective power to increase the income of Social Security beneficiaries who were pensioners under offset plans. It could only *propose* such an increase and hope that it would find its way to the retired workers and would not accrue to the employers. Only insofar as the employer under an offset plan relented, and permited all or part of the increase in OASI to go to his pensioners, did the exercise of Congressional power find its proper object. The offset provision thus appears as an obstruction to the vital power of Congress to provide a legislative remedy for an evil threatening the foundation of the Social Security system, an obstruction which is opened or closed at the pleasure of the business manager.

In 1950 Congress took cognizance of the plight of the aged and gave them a cost-of-living supplement of $20.00 to $25.00 a month. And the simple fact of the matter is that, to the extent of the offset, this supplement did not accrue to pensioners but to their former employers. The Bell system used the cost-of-living allowance by Congress

in 1950 to decrease its own obligation to its pension fund. If the judgments of the courts below affirming this practice are allowed to stand, it means that Congress has no effective power on its own motion to protect the Old Age benefits of workers who receive pensions under offset plans. It means that Social Security increases by Congress are permitted to go to these workers only by the employers' grace.

Here, then, is an issue which transcends the personal interests of the individuals concerned and relates to the power of Congress to legislate without interference upon a proper object. From the point-of-view of public importance, this, indeed, is one of the most formidable issues in the case. The trial court openly made the vital admission that the offset of the 1950 increases shifted the benefit thereof from the pensioners to the employers, and that this apparently violated the spirit of the law.

> "There is no question but that a private pension plan integrated as the Bell Plan is with OASI benefits absorbs all or a part of the increases which Congress votes in the government benefit. Since one purpose of the increases is to compensate for the rising cost of living—that is, to help maintain at an even level the value of the retired workers income—in a sense the offset decree might be thought to violate the spirit of the Social Security laws." (R. 209).

But although there is an admitted appropriation by a great corporation of a cost-of-living allowance intended by Congress for the benefit of retired workers; although this, is admittedly "in a sense" in violation of the spirit of the law, the trial court refused to interfere. The reason given is "there is no evidence Congress adopted such an attitude toward offset". (R. 209) Here, again, the absence of Congressional action is treated as positive proof of Congressional approval and is made the ground for overcoming the court's tentative conclusion that the practice is

repugnant to the statute. The plaintiffs must not only prove the affirmative proposition that the defendants' practice violates the policy and spirit of the law; they are also expected to rebut the negative proposition that there is no evidence that Congress disapproved the practice. But to excuse an apparent violation of law on the ground that there is no evidence that the lawmaker considered it as such is patently self-contradictory. That a practice violates the spirit of the laws, as the trial court concedes this apparently does, *already presupposes* that it violates the intention of the lawmaker.

But Congress, it is said, must have condoned this result because it was aware of the offset practice (R. 210). The implication of this argument is that Congress in 1950 acquiesced, and could acquiesce, in the defeat of the object of its own legislation. But before we consider such an extraordinary suggestion, where is the proof that Congress actually was aware that the offset practice would result in the appropriation by employers of the OASI increase given in the 1950 Act and that it acquiesced in the result? There is not a single reference to a debate on the floor of either House of Congress, nor to any Committee report to support the theory of detailed Congressional knowledge and of a deliberate acceptance by Congress that the 1950 cost-of-living supplement to OASI would be absorbed by employers with offset plans. The opinion of the court makes a single reference to the offset by one Committee witness, and another reference to a memorandum filed by another witness, while a third reference to a Committee report merely says that the relations between Social Security and private plans still have to be worked out. (R. 209, 210). On the basis of these trivialities we are asked to believe that Congress has deliberately sanctioned a practice which the court itself admits is "in a sense" contrary to the spirit of the law.

But even if it had been fully shown, up to the hilt, that Congress intended and sanctioned this nullification of its own power, we should then be confronted with the even graver issue whether such a consent is proper in our Constitutional system. The question is ultimately not one of intention but of power. If Congressional power to legislate upon a proper object is obstructed, the obstruction must be removed, and any supposed intention of Congress to acquiesce in the abridgement of its legislative power is irrelevant.

The trial court showed no awareness of the extraordinary implications of a principle which would imply Congressional consent to the limitation of its own powers. The Court of Appeals did not consider the question even worth discussing at all.

C. When a retired worker who has become entitled to OASI under 42 U.S.C. 402(a) takes covered employment and in consequence becomes disqualified from receiving payment under 42 U.S.C. 403, does his OASI continue to be "payable" during the period of his disqualification?

Under 8 (27) a service pension is subject to offset only if a pension or benefit is "payable" under a law to the pensioner. But what happens when the pension or benefit ceases to be payable, and in fact ceases to be paid, because the recipient has disqualified himself from receiving it by the terms of the law itself? Several of the plaintiffs took jobs for short periods of time after their retirement and during these periods their OASI ceased to be payable under 42 U.S.C. 403. The defendants did not, however, discontinue the OASI offset during such periods; and this represents the official policy of the Company in all such cases (R. 170). How does the trial court justify this refusal to discontinue the offset on these facts, considering

that the claim of authority to make it in 8 (27) rests squarely and exclusively on the condition that the government pension be "payable" to the Bell pensioner?

The court tries to escape from this difficulty by boldly embracing a paradox. OASI continues to be "payable", it is said, even though payment is prohibited by law.

> "... the Social Security Act is written in such a way that as soon as an individual meets the qualifications for an old-age benefit, he becomes entitled to it regardless of subsequent events. Thus despite the seeming paradox, the benefit remains payable even though the pensioner will not receive it." (R. 214).

A basic question of statutory construction is thus presented. Is OASI still "payable" under the Social Security Act even though its payment has been prohibited during covered employment? The trial court answers in the affirmative because under 42 U.S.C. 402(a) every person who has met the requirements shall be "entitled to" OASI for the rest of his life (R. 215). But the court fails to notice that the amount of the OASI entitlement which is actually payable to him may be reduced from time to time under certain conditions set forth in § 403(b) of the statute, including, *inter alia*, the earning of wages in covered employment. The statute makes an obvious distinction between the amount of OASI to which the insured person is *entitled* and the amount which is from time to time *payable*. Unless this distinction is accepted, there is no way of avoiding the violently paradoxical result, admittedly embraced by the trial court, that OASI is payable even though it has not been and could not have been paid, and even though the individual is absolutely disqualified from receiving payment.

On the Court's interpretation, women Bell pensioners will now be subject to OASI offset at age 62 even though, under the 1956 act, they choose to postpone receiving OASI until age 65.

II. THE COURT OF APPEALS HAS DECIDED QUESTIONS OF GENERAL LAW OF GREAT NATIONAL IMPORTANCE ARISING OUT OF THE INTEGRATION OF SOCIAL SECURITY BENEFITS WITH PRIVATE RETIREMENT PLANS. THESE QUESTIONS HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

A. May an employer, during the pensioner's retirement, redetermine the amount of the pension granted on retirement, in the absence of specific authority in the pension plan to do so?

The issue here is whether under § 8 (27) a Bell pensioner has a right to have his service pension determined once and for all when he retires. If he does, then it follows that the amount of the OASI offset must also be finally determined at that time and the subsequent changes in the amount of OASI, following changes in the Social Security Law, will have no effect upon his Bell pension. Likewise, changes in the Plan after his retirement will not affect him if it is the case that the net pension once determined on retirement is a final determination. The language of 8 (27) does not explicitly say that there must be only one calculation. Neither does it explicitly say that the Company has authority after retirement to make a recalculation. It is concerned with *how* the amount of pension payable shall be computed. But on the question, *when* that amount shall be computed the Plan is silent. The trial court admits that § 8 (27) fails to say explicitly that the defendants have authority to recalculate the amount of a pension after retirement and that the provision is not written in terms of the time when the calculation is to be made (R. 205).

The plaintiffs argued that the net service pension must be determined once and for all at the time of retirement because it can be determined only by means of a "grant",

and a grant can take place only once, at retirement. The right of the Bell employee to his pension payments does not arise automatically when the eligibility requirements have been met. The Plan is not self-executing. Even an employee who is entitled under the contract to retire at his own request under § 4(a) cannot make an unmediated demand on the Trustee for pension payments. Under the scheme of the Plan there must first be a formal act of grant by the Benefit Committee appointing him to a life interest in the pension fund. The Trustee is specifically forbidden to pay out except after and upon such direction. Pension payments are never made by the Company itself but only by the trustee out of the trust funds. But until the grant by the Benefit Committee the employee has no enforceable right or interest against the fund or the trustee. It is the grant, and not the Plan, which is administered by the Trustee, and it is from the grant that the pensioner derives his enforceable right against the Trustee and the fund. From the necessity of a "grant" of pension to the retiring employee as the vestitive fact of his right to receive pension payments from the Trustee, it follows that the net service pension must necessarily be computed once and for all at the time of retirement and grant of pension. Since the grant is a single and unique act, the pension payable cannot be a matter of redetermination thereafter.

If the issue of single versus multiple determination of the offset factor still remains inconclusive, the ambiguity must be resolved against the defendants on numerous grounds: (1) An interpretation against any reservation of power by the employer over the interest of the pensioner after retirement ought to be preferred. *Scofield* v. *Zion Coop. Mer. Int.*, 39 P. 2d 342. Common sense and sound reason favor protecting that interest from action by a former employer and for limiting the employer's authority to persons still in his employment.

It is not in the public interest to project an employer's power beyond the period of employment and to give him a position of influence and leverage over his former employees. (2) Pension plans ought to be liberally construed in favor of the retired worker. *Dom* v. *State Ret. Bd.*, 345 Pa. 489, 494. (3) The pension contract must be construed most strongly against the defendants who prepared it. *Ulmann* v. *Sunset-McKee Co.*, 221 F. 2d 128, 133; *Western Union Tel. Co.* v. *Hughes*, 228 F. 885. This principle applies with particular force here *because neither the plan nor the changes therein were the product of collective bargaining.* In protecting his pension rights, each of the plaintiffs has therefore had to face the Bell system alone. Courts have recognized that a difference in bargaining position is an important operative fact in construing a contract and have made great efforts to protect the weaker contracting party. *U. S.* v. *Lennox*, 225 F. 2d 302, 315, 43 Columbia Law Review 629, 633. (4) It is economic nonsense to encourage a regressive system of pension payments, such as resulted from the defendants' recomputation downward of the service pension in 1950, notwithstanding that costs of living had greatly increased in the preceding decade. And the law ought not to favor such a result. (5) Finally, the reasonableness and justice of vesting pension rights once and for all on retirement was recognized by the defendants themselves in 1952 when they reversed their position and amended their plan in that sense.

A pension grant ought not be subject to continuing powers in the employer unless these are expressed in unmistakable, categorical terms. Such powers ought not be raised by inferences from general expressions. He who claims that a pension, once granted, may later be reduced, must point to language so clear and compelling as to admit of no other possible interpretation. Considering that pension plans now affect millions of people it is important to settle and to reaffirm these protective principles.

B. Does OASI duplicate industrial pensions?

A basic term of reference on which both sides agree is that the legal justification for making any offset at all under the Bell plan depends on whether the statutory payment duplicates the pension payment. § 8 (27) is one of a group of defensive provisions intended to protect the company from paying twice on the same operative facts. It would be obviously unfair, for example, to require the company to pay a workmen's compensation award for an injury and to pay again under the Plan for the same disability. The defendants have therefore always rested the justification of the offset on the proposition that they ought not pay twice for the same horse. The trial court referred to:

> "The defendants' expressed policy that Government benefits were intended to be offset only when they are of the same character as the benefit payable under the Plan" (R. 191).
>
> "The reason for this policy, as expressed in company statements, is to avoid duplication of benefits and costs" (R. 191).

But OASI is obviously not a payment by the company, but by government. How, then, can it duplicate payment of pensions by the company? The plaintiffs showed by historical and textual analysis of § 8 (27) that the statutory payment properly subject to offset was intended exclusively to denote payments by the company in discharge of its statutory liability to employees. And the plaintiffs showed by quotation from the files of the defendants that there was a serious conflict of opinion among executives within the Bell system on this point. The requirement that what is offset can only be a company payment was explicitly stated in § 8(27) from 1913 to 1928 and then was improperly removed by the defendants from the pension contract without consulting their employees. The trial court nevertheless resolved this issue in favor of the

defendants, holding that the duplication required as a condition of the offset need not be in payments by the company. It said that the real question is whether there is duplication of costs, that is, whether the company's payroll taxes in support of Social Security system are the same in kind as their cost of supporting their pension plan. Taking the courts own conclusion as our premise, the basic question as to the defendants' authority under the pension contract to offset OASI against service pensions depends, then, on whether in fact the costs of service pensions and OASI duplicate each other.

The issue boils down to this: Are the private and public systems substantially alike in their basic purposes? For, if they are not, then the company's Social Security payroll tax does not duplicate its payroll accrual for pension funds; and the OASI received by the pensioner cannot be said to duplicate his service pension. Let us briefly consider some of the vital differences:

(1) OASI is, whereas the industrial pension plan is not, *an insurance* program. The exclusive purpose of OASI is insuring against the risk of a destitute old age. It would be stupid to say that the Bell pension, after it has been granted, gives its beneficiaries no protection against the hazards of old age. But there is a great and essential difference in the kind of protection. Under the Social Security system the worker is fully insured when he has the required quarters of coverage from six to forty, which he can acquire in no matter how many employments; and once he has this minimum he is fully insured and remains fully insured the rest of his life. This means that at a relatively early point in his working life he gets from the Social Security system unconditional security against the risk of old age destitution. And this assurance is not conditioned, as is the industrial pension, upon long and uninterrupted service with a single employer until retirement. Under the

defendants' Plan, where the objective is primarily to remove the superannuated worker, there is no such assurance until *after* the worker has been retired. His entitlement to a Bell pension is not perfected until he has actually separated from Bell employment and been granted a pension. Before that time he can be discharged with or without cause, and *he will have no Bell pension rights* for his old age. A Bell System employee has no vested rights whatever in a service pension which survives his discharge before retirement on whatever ground. *Webster* v. *S. W. Bell Tel. Co.*, 153 S.W. 2d 498. Since his pension rights are dependent upon uninterrupted continuance of employment until retirement he has not that assurance *during his working life* against the risk of destitute old age, which he gets from the Social Security System. That is why, when judged by their basic characteristics, OASI is, and the Bell Pension Plan is not, an insurance system. The difference essentially is between insurance against old age destitution which comes into force during a man's working life and a reward for uninterrupted service which comes into force after his working life is over.

(2) The purpose of a company retirement plan is to solve the organizational problem of displacing superannuated workers in an orderly manner. It is primarily an instrument of personnel policy. *T. V. A.* v. *Kinzer*, 142 F. 2d 833, 836. The defendants have candidly admitted this:

> " . . . while it must be obvious that the plan is in harmony with the general social objectives of private income for the aged, its fundamental purpose is neither to provide old age insurance nor to provide additional compensation. (Pls. Ex. 85).
>
> "The foregoing statement makes it perfectly clear that the fundamental purpose of service pensions in the Bell System Pension Plan is—and always has been—one which must be stated in terms of advantage to the business." (Pls. Ex. 93).

There is a great and essential difference, then, in the role of the public and private systems in the industrial economy. Social Security is an effort by government on behalf of the security and welfare of our population as a whole, while the industrial pension is a tool of management in running a business. The one insures; the other rewards. The one operates without regard to a specific relation of employment; the other is part of a particular contract of employment and its aim is to encourage long tenure and loyalty to the employer, while enabling him to replace aging personnel.

(3) But, says the Trial Court, both are obviously programs of retirement, and therefore, they are essentially the same in spite of their differences (R. 192). The Supreme Court of New Jersey in *Deaney* v. *The Linen Thread Co.*, 118 A. 2d 28, has considered and specifically rejected this assumption. Social Security is not a retirement from employment program. "Retirement" is defined in the Act as simply meaning age 65 (§ 416a). It is nowhere used in the law as meaning separation from employment. Any one may become entitled to the insurance benefit under § 402(a) if he is (1) fully insured (*i.e.*, has the minimum quarters of coverage), (2) has attained age 65, and (3) has filed application. He thereupon becomes entitled and remains entitled to OASI until he dies. It is not necessary, in order to be so entitled that he quit working at age 65. He can file his application at that age while he is on the job and he can stay on the job without a break for the rest of his life; and he will still be entitled to OASI from the moment of his qualification under § 402(a) until he dies.[1] Under the Social Security program retirement from employment is not a condition of entitlement, as it is under industrial plans.

[1] On the distinction between entitlement and payment, above p. 23.

(4) The trial court seeks to attenuate the requirement of duplication as a condition precedent to the offset, by saying that § 8 (27) of the Plan requires that the sameness need only be "*of the same general character*". (R. 191). The court overlooked that this clause was inserted by the 1946 amendment to the Pension Plan after most of the plaintiffs here had already been retired, and therefore it is in any case inapplicable. But aside from this, whether the sameness of kind between two objects be more or less general is an unprofitable question, debatable without end or issue. The matter can be usefully approached, as we have attempted it, only from the operational point-of-view of purpose and function in our industrial society. What is significant is not whether there is a concept under which both can be subsumed, but whether the differences in their respective roles are so significant that the court should recognize and attach legal consequences to these differences.

In the past two decades retirement plans have been adopted almost universally by large business enterprise. During that period the Social Security system has become a vital part of government. Legislative policy has never been interpreted as to the permissible limits within which both can find a basis of mutual adjustment. The first step in that process is to settle the question whether they serve identical or variant functions. Each is indispensable to our welfare. But are they indispensable in the same way or for the same purpose?

C. May an employer, acting under a general reservation of power to amend a pension plan, give differential and less favorable treatment to pensioners as compared with still active employees?

In 1952 the defendants capitulated before the criticism evoked by their practice of depriving their pensioners of

the benefit of one-half of the 1950 Social Security increases, and amended their Plan so as to recognize the principle that a pension in the amount granted on retirement, after offset of Social Security, is indefeasible. But the 1952 amendment made one exception: pensioners retired on or before August 31, 1952 were not to have the offset determined by reference to the amount of OASI on the date of their retirement, but by reference to the amount under the Social Security Act of 1950. The Court of Appeals has admitted the difference in treatment. (App. A. p. 47)

If we look at the facts, they are overwhelmingly against less favored treatment of pensioners retired before 1952. Having earned their wage credits for pension purposes during the relatively low wage levels prevailing in the war and pre-war periods, they are already at a disadvantage as compared with those retiring afterwards whose wage base for purposes of the pension is already heavily weighted by the higher wage levels prevailing during the post-war period. On realistic grounds, a classification cannot be justified which denies the first group, already heavily disadvantaged, a benefit given the second.

The trial court says that a donor with reserved power to amend is under no duty to the cestuis to exercise the power in any particular manner (R. 212). But there is a difference of decisive importance between the usual private trust and the industrial pension fund, which makes it altogether inappropriate to apply to the industrial pension the ordinary law of trusts as to the powers of the donor to amend. The conventional private trust is a donation, a gratuitous transfer by a donor to the objects of his bounty; and since he is giving away *his own* money he may, of course, be as arbitrary and discriminatory as he pleases. But the industrial pension is not a gratuity. It has been earned. It is now generally regarded as part of the workers wages. In its early history, a company pension used

to be generally considered a species of business philanthropy—a sentimental recognition of long and loyal service. Many of the older cases, and some more recent: *Webster* v. *S. W. Bell Tel. Co.*, 153 S.W. 2d 498, were decided on the corresponding legal premise that such pensions were gratuities and therefore within the entire discretion of the Company to give or withhold, add, subtract, or change. Today, the industrial pension is recognized as an indispensable device of business management in promoting efficient and economical operation through the orderly superannuation of older workers. *New England Tel. & Tel. Co.* v. *U. S.*, 53 F. Supp. 400, 409. It is now entirely at rest that industrial pension plans are contractual in character, an agreement to pay a deferred wage. *Inland Steel* v. *Nat. Lab. Bd.*, 170 F. 2d 24; *Sedwith* v. *Bankers Life Ins.*, 54 N.W. 2d, 409, 417. The pension fund is therefore constituted not by donations of the company but out of wages earned by and contingently belonging to the employee which under the pension contract are being segregated and accumulated in trust but are deferred as to enjoyment until his retirement. Whenever the defendants amend the Plan so as to change the rules governing the pay-out of these trust funds, they are dealing with money which is not and was not theirs. These funds were earned by and are irrevocably the property of the pensioners and of the pensioners alone. On what principle of law or morals, then, can the defendants presume to pick and choose among classes of beneficiaries and to adopt more advantageous rules for some than for others in distributing other peoples' money? Only on the undisclosed premise that pensions are gratuities, after all, and as such may be disposed of at the grace and pleasure of the employer. But that is no longer an acceptable premise for the pension structure of our modern industrial society.

Not only are pension funds trust funds; they are trust funds which in their impartial and punctilious administration, are entitled to the special solicitude of the courts. And this, on a number of specific grounds. (1) The Federal revenue laws permit the defendants special tax advantages by way of deducting pension payroll accruals from taxable income. Tax deductions are an indirect social contribution to corporate pension funds, and create a public interest in their impartial administration. (2) The defendants have claimed the right to integrate their pension plan with Social Security payments, *i.e.*, to treat Social Security as supplementary to their corporate pension plan. If this claim be recognized by the Court, (if it be rejected this ground of complaint would be moot) a public interest in the administration of the fund unavoidably results from the combination of both Social Security and private pension fund into a single system, in which the public payment is made to serve a vital, supplementary role in the functioning of the private plan. The practice of integration thus brings into force the correlative and countervailing principle that integrated funds must be subject to special scrutiny to assure non-discriminatory treatment.

The industrial pension trust differs from the usual private trust in another important particular; not only does it arise out of the wage relation so that its benefits are earned, while the conventional trust arises out of private bounty; but just as importantly, it is on a scale of magnitude, in the size of funds and in number of beneficiaries, which is incomparably greater than those of the usual trust. This calls for change in emphasis in the application of received doctrine concerning the interpretation of reserved powers to amend. Since the pension benefit is earned and the pension beneficiary stands, in an impersonal relation to the Company, the scope of the Company's discretion must be more narrowly defined. Since the pension

trust is often of gigantic size—in this case approaching two billions in funds and affecting a large public of more than a half million of beneficiaries, retired and to be retired, scattered all over every State of the Union—the principle of impartiality and non-discrimination must be stringently enforced. Differences in treatment of beneficiaries must be the subject of scrutiny as presumptively discriminatory, and the burden of justifying such differential treatment must be on the employer who purports to exercise reserved powers.[1]

It is important for this Court to settle the principle that employer's powers of amendment of pension plans are subject to the limitation that they must be exercised without discrimination among beneficiaries of the pension fund; and that employers have no power to use funds, earned by and accumulated for employees already retired, to finance differential and more favorable treatment for still-active employees.

III. THE CIRCUIT COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE POWER OF SUPERVISION BY THIS COURT.

A. The views expressed by the Court of Appeals on the principal issue show confusion of thought and ought not be permitted to stand uncorrected.

On the principal issue of statutory construction, whether the offset of OASI is a transfer in violation of § 407 of the

[1] An analogy is the duty of a labor organization, having bargaining rights, to represent all of members of a craft or class, whether or not members of the union, in a manner which does not discriminate against a class, of non-members. *Steele* v. *Louisville & Nashville R. R.*, 323 U.S. 192.

Social Security Act, the sole comment by the Court of Appeals, after adopting the view of the trial court *in toto*, is as follows:

> "We need add little; we merely observe that if defendants do receive an economic benefit from OASI by the reduction of payments from the private pension funds, that benefit is largely theoretical. In part, at least, the deduction of one-half of OASI entitlement represents a writing-off or balancing of a superadded liability, inasmuch as the federal OASI Tax would otherwise impose upon defendants a greater economic burden than that which they voluntarily assumed when they adopted the private plan. It can be as legitimately said that the deduction complained of is a device to maintain in balance the assumed burden of contribution to pension funds generally, as to say that it represents a "reaching" for an economic benefit. In any event, we think that this poses a problem within the realm of moral evaluation, not legal." (App. A. pp. 46, 47).

The court appears to admit the possibility that the economic benefit of the OASI payment to the pensioner is absorbed by the Bell System. But it concludes that this benefit is "largely theoretical". The import of the term "theoretical" is impossible to determine in this context. How can a benefit accruing to the defendants from the offset be merely "theoretical" if it occurred in the manner described, *i.e.*, by a reduction in the amount of an obligation which otherwise would be payable by the defendants. Such a benefit is as "theoretical" as the hard coin of the realm. If the benefit is only "theoretical" because it arises in some other manner, how then does it arise? And what is the significance of the qualification "largely" in referring to the theoretical benefits? Does this not imply an area of advantage, a quantity of benefit derived by the defendants, which is not merely theoretical but actual?

"In part at least", continues the court, the offset is the balancing-off of a superadded liability in excess of that voluntarily assumed by the defendants. Assuming that such an avoidance of the increased burden of a Social Security tax by the employer is proper, what is the meaning of the qualification "in part at least"? Does this not imply that there is another part which is not covered by the rationalization that follows?

Again, the court says, the offset can be legitimately considered in one of two ways: either as a device to keep in balance the defendants' aggregate contribution to all pension funds, or as a reaching for an economic benefit. Have we not here an explicit admission that the defendants' offset practice is essentially ambiguous? With the same justification, says the Court, it can be viewed either as a proper business device or as a reaching-out for other peoples' Social Security benefits. But if there is *any* point-of-view from which the offset practice can be seen as an acquisition by the employer of the statutory benefit intended for pensioners, then it is repugnant to the statute. If there is any ambiguity on this point, it must be resolved against the employer. It was not for his security that the Social Security law was enacted.

We are dealing here with the interpretation of a statutory provision affecting the interests of millions of our people, beneficiaries under a great act of social reform. The matter has not been served by multiplying phrases and terms of indefinite import. It is respectfully submitted that the reasoning of the Court of Appeals on the central question of the case is wanting in the precision that ought rightly be expected from an appellate court in judging an issue of such great pitch and moment.

B. The dichotomy between the law and morals announced by the Court of Appeals as a proper standpoint for judging the issues here is dangerous doctrine when applied to the interpretation of a great effort of social and remedial legislation and should be explicitly repudiated by this Court.

The obscurities and the qualifying clauses, with which the Court of Appeals sums up the basic issue reflect a deep-seated uncertainty about the rightness of its solution. The problem and the court's doubts are still unresolved, and we are referred, in the end, to the consolations of philosophy: (App. A. p. 47)

> "In any event, we think that this poses a problem within the realm of moral evaluation, not legal."

The implication is clear that if judged on moral grounds alone, the issues here might be otherwise decided, and this imperviousness of legal judgment to moral considerations is emphasized in the closing statement of the court when it says that the question whether the offset is "unfair and misleading" is irrelevant to the legal issues. (App. A. p. 48).

The doctrine that what is morally wrong may be legally privileged has never been altogether valid even in such fields as property law, where, in the interests of social stability, legal form and doctrine have coagulated. But that glib axiom can never be true, it is false and pernicious, when applied to the judicial interpretation of an important measure of social reform affecting, as it does here, the vital interests of our whole working population. A great act of legislative policy is a point of convergence of the moral, legal and political forces of its time, and usually receives its first impulsion from a deep-seated moral judgment upon some deficiency of our social order. To reject any consideration whether a practice is morally wrong when interpreting that legislative policy is to be unmoved

by the spirit which gave life to the act of the lawmaker. And that is why the trial court, whose views have been adopted integrally by the Court of Appeals, was able to deny that the offset of the 1950 OASI increases was unlawful, even though that practice admittedly violated "the spirit of the law". It is monstrous that under the slogan of a divorcement between legal and moral considerations, a judge should feel obliged to suppress a sense of moral outrage in passing judgment upon a practice by which a great corporation, as the Judge admits, appropriates to itself a cost-of-living supplement intended by Congress to ease the lot of retired workers.

The exclusion of moral considerations from the judgment of basic legal issues is dangerous to the life and vitality of the law. The sanctions of our system of law and the respectful acceptance enjoyed by the mandates of our courts rest upon a consensus which is rooted in the moral sentiments of our society. The legal order and the judges who are its guardians ought never be neutral toward practices which may be morally wrongful to millions of our working population, or "unfair and misleading" to them. Because the Court of Appeals closed its mind to these considerations it committed grievous error.

CONCLUSION.

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE WALK,
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Attorneys for Petitioners.

APPENDIX A.

OPINION OF C. C. A.

In the

United States Court of Appeals

For the Seventh Circuit

OCTOBER TERM 1955, APRIL SESSION 1956.

No. 11646

FREEMAN S. HURD,
Plaintiff-Appellant,

v.

ILLINOIS BELL TELEPHONE COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY and the BANKERS TRUST COMPANY OF NEW YORK,
Defendants-Appellees.

No. 11645

HARLEY A. SEYBOLD, WALTER S. YOUNG, CHARLES E. KLUEGEL, MILO S. BUCK, W. O. OLIVER, ARCHIE B. CALENDER,
Plaintiffs-Appellants,

v.

WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE COMPANY and THE BANKERS TRUST COMPANY OF NEW YORK,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 27, 1956.

Before MAJOR, LINDLEY and SWAIM, *Circuit Judges.*

LINDLEY, *Circuit Judge.* These appeals from judgments in favor of defendants present identical questions. At the time of the oral argument we entered an order permitting one Harry C. Bordwell to intervene as a party appellant in No. 11646, subject to the further order of the court. We shall allow that order to stand, despite any doubt pervading its propriety, but feel that our determination in this respect should be clarified.

The original action was brought by plaintiff Hurd, a retired employee of defendant Illinois Bell Telephone Company, who asserted a claim predicated upon the Bell retirement pension plan on behalf of himself and as the representative of all other pensioners similarly situated. His efforts in this respect appear to have been financed by funds collected from numerous members of the supposed class. It further appears that certain parties now doubt Hurd's faithfulness in prosecuting the appeal on behalf of the represented class, and petitioner, a member of the class, asserts that he is entitled of right, under the provisions of Rule 24 (a) of the Federal Rules of Civil Procedure, 28 U. S. C., to intervene to insure that he and other members of the class will not be injured should Hurd, by his actions jeopardize the effective prosecution of this appeal.

We think this argument is hardly tenable, inasmuch as it presumes and depends upon the existence of a real class action. Here we are dealing with a spurious class action, containing common elements of fact and law, but based upon separate and individual claims growing out of the same transaction. *Hughes* v. *Encyclopedia Brittanica,* 199 F. 2d 295 (CA-7); *Kainz* v. *Anheuser-Busch, Inc.,* 194 F.

2d 737 (CA-7). In such an action, separate judgments are entered "and no one is bound unless he is present." *Kainz* v. *Anheuser-Busch, Inc.*, 194 F. 2d at 742. Therefore, petitioner is not bound by the judgment and is not, we believe, entitled to intervene on appeal as a matter of right.

But, although intervention after judgment is not to be lightly permitted, this cause is so fraught with elements of possible prejudice to petitioner and other pensioners similarly situated, that we, in the exercise of a sound discretion conclude that our order permitting petitioner to intervene should be allowed to stand. This view is fortified by the fact that defendants do not loudly contend that this disposition of the question will in any way prejudice their rights. They base their resistance to Bordwell's petition largely upon the asserted lack of merit of petitioner's claim of right. For these reasons, our order will stand and petitioner Bordwell is added as a party plaintiff-appellant in appeal No. 11646.

The plaintiffs in No. 11645 are retired former employees of either defendant Western Electric or defendant American Telephone and Telegraph Company. As we have previously state, the plaintiffs in No. 11646 are retired former employees of defendant Illinois Bell. These parties are hereinafter referred to as plaintiffs and defendants without distinction between or identification of the parties in the separate appeals.

Each appeal involves the validity of defendants' interpretation and administration of the company sponsored retirement benefits plan commonly known as the Bell System Pension Plan. In 1913, each defendant executed and put into effect a retirement pension plan for its employees. The three plans involved are identical and are hereinafter

referred to as the Bell plan or the pension plan, without distinction. This plan is a unilateral arrangement whereby each defendant undertook to provide retirement benefits to its employees, and, for this purpose, to allocate a determinable sum annually to a fund set aside for that purpose. No employee contribution is required. Each defendant has deposited sums allocated to its plan with defendant Bankers Trust Company under separate trust agreements whereby the latter company has undertaken to disburse the funds in accord with the orders of the respective settlors. No question of breach of trust by Bankers is presented; it is a nominal defendant only, and is not included in the generic term defendants when used herein.

The plan provided for the payment of pensions to each employee retiring after specified periods of employment, in an amount to be computed upon the basis of a percentage of such employee's average wage multiplied by the number of the years of his employment. In 1914, in apparent anticipation of public pensions or benefits to aged persons, the plan was amended by the addition of a provision in the following language, which now appears as Section 8 (27):

> "In case any benefit or pension shall become payable under the laws now in force or hereafter enacted of any State or Country to any employee of the Company or his beneficiaries under such laws, the excess only, if any, of the amount prescribed in these Regulations above the amount of such benefit or pension prescribed by law shall be the benefit or pension payable under these Regulations. * * *"

With the advent of the Social Security Act, 42 U. S. C. §§ 301, *et seq.*, defendants amended the plan in 1940 by inserting therein a new paragraph, Section 8 (28), which provided that, upon the date when any pensioner becomes

"entitled" to receive Old Age and Survivors Insurance benefits under the Act, "the amount of his monthly service pension otherwise payable under this Plan shall be reduced by one-half of said 'primary insurance benefit' (OASI) * * *." This provision was not modified in any material detail until 1952 when the section was amended in certain respects which will be discussed subsequently.

Plaintiffs as retired employees, are beneficiaries under the plan by reason of their employment for the requisite number of years. Each of those who retired within the decade from 1940 to 1950, since retirement, has received monthly pension payments in accord with defendants' interpretation and application of the plan, *i.e.*, in an amount computed consistently with the basic arithmetical formula prescribed in the plan, less one-half of the monthly OASI benefit to which the employee was "entitled" at the date when the monthly pension check was payable. In other words, upon retirement, the amount of an employee's monthly gross pension is finally fixed by application of the formula, but the deduction therefrom on account of OASI entitlement is scaled upward as Congress increases the primary OASI benefits and the net pension payment from the fund is commensurately scaled downward. Until 1952, Section 8 (28) was amended in form, but not in substance, to comport with amendments of the Social Security Act.

Plaintiffs in each case set out these facts; each asked for judgment in the aggregate amount by which the pension payments received by him since retirement have been reduced by deductions on account of OASI benefits. The theory of each cause rests upon basic contentions, first, that the pension plan, and, specifically, Section 8 (27) did not contemplate deduction of OASI benefits from private pension payments, and, second, that interpretation of the plan to permit the deduction of a private industry pension

because of the entitlement to, or receipt of, OASI benefits is a violation of the Social Security Act, specifically Section 207 thereof, 42 U. S. C. § 407. A number of contentions are asserted by plaintiffs, but all are parts or variations of those major premises.

Our task is materially aided by the exhaustive opinion written by Judge Hoffman. He examined critically and in detail each contention relied upon by plaintiffs, examining the pertinent provisions of the plan and construing them in the light of the intention of the parties and as affected by the application of numerous legal authorities. He also analyzed the relevant provisions of the Social Security Act and adopted a construction of the statute resting upon an exhaustive analysis and application of many authorities.

We have examined the record, the extensive briefs of the parties and the authorities upon which their reliance is placed and are convinced that the trial court's decision is sound. We have found no authority which impinges upon its reasoning and conclusions. No helpful purpose can be served by repeating what has already been said by the judge in his opinion reported as *Hurd* v. *Illinois Bell Telephone Company,* 136 F. Supp. 125. Consequently, we shall restrict our comments to a brief supplement, dealing with matters now urged as error.

The pension plan is a unilateral contract which creates a vested right in those employees who accept the offer it contains by continuing in employment for the requisite number of years. The first major contention of plaintiffs largely depends upon just what the right is which vests in an employee upon his retirement in accord with the plan. Such an employee receives only a right to receive a monthly pension, not in a specified amount, but in an amount com-

puted in accord with the provisions and conditions of the whole contract.

One such condition arises out of the provisions of Section 8 (27) which requires the deduction from gross pension under the plan of any public benefits to which a pensioner is entitled under federal or state statutes. We agree with the trial court that this provision is broad enough to comprehend OASI benefits. Juristic niceties of distinction between such terms as "pension", "benefit" and "insurance" as applied to this question must give way before the manifest intention of the parties as shown by their writing. We think there can be no doubt that Section 8 (27), when read in conjunction with the contract as a whole, was intended to encompass all public payments of old age benefits by whatever name they may be called. And we agree with the determination that OASI is within the category of benefits to which the section applies.

We agree, also, that the policy which was written into the plan requiring the deduction of one-half of OASI benefits from the private payments violates neither the letter nor the spirit of the Social Security Act. The reported opinion has supplied us with a detailed analysis of both the proscription against transfers contained in Section 207 of the Act and the Congressional policy embodied in the enactment. We need add little; we merely observe that if defendants do receive an economic benefit from OASI by the reduction of payments from the private pension funds, that benefit is largely theoretical. In part, at least, the deduction of one-half of OASI entitlement represents a writing-off or balancing of a superadded liability, inasmuch as the federal OASI tax would otherwise impose upon defendants a greater economic burden than that which they voluntarily assumed when they adopted the private plan. It can

be as legitimately said that the deduction complained of is a device to maintain in balance the assumed burden of contribution to pension funds generally, as to say that it represents a "reaching" for an economic benefit. In any event, we think this poses a problem within the realm of moral evaluation, not legal.

Our remarks may be concluded with a brief consideration of the validity of the trial court's conclusion as to the effect of the 1952 amendment to Section 8 (28) of the plan. In 1952, Congress so amended the Social Security Act as to increase the primary OASI benefit which would have required a further reduction of the private pension payments to retired employees. In response to this amendment, however, Section 8 (28) of the plan was amended to provide that deductions from pension payments of employees retired prior to 1952 would be scaled to the primary OASI benefit under the 1950 Act, while payments to employees retired after 1952 would be reduced by an amount equal to one-half of the OASI benefit to which such employees would be entitled under the statute in force at the time of retirement. This provision is challenged as discriminatory.

We cannot agree. The effect of that amendment upon plaintiffs was to remove the uncertainty of the superseded section, which had conditioned the determination of the amount of pension payments upon subsequent amendments of the Social Security Act and to fix a final condition subsequent which would establish once and for all time, the amount of their monthly pension checks. As to employees, active in 1952, the revised section represents a new basic procedure for determining the amount of OASI deductions and, in this respect, a new unilateral contract which they could accept by continuing in employment for the requisite number of years. In other words, the 1952 amendment

represents two separate contracts in one, closing the group who had accepted the offer upon retirement prior to 1952, and opening a new group composed of the then active employees who ultimately might qualify thereafter.

Plaintiffs have no cause for complaint if their net pension entitlement was computed by application of the provisions of the contract as it existed at the time of their retirement, irrespective of whether successor employees might receive enhanced benefits from a new contractual undertaking. We believe that plaintiffs have received the full measure of their rights under the plan.

The following language from *Hurd* v. *Illinois*, 136 F. Supp. at 156, adequately sums up the correct disposition of these appeals: "The decision is in no way a judgment of the merits of the offset device. The court has concluded only that the Bell Plan authorized the deduction of Social Security benefits in the manner followed and that no rule of law, including the Social Security Act, makes unlawful a pension system which takes advantage of governmental benefits to which employees subsequently become entitled. Whether the integration of a private pension plan with Social Security to produce the results found in this case is good policy or unfair and misleading to the employees is a question which the court cannot decide for the parties in this action."

The judgments are AFFIRMED.

A true Copy:

Teste:

Kenneth T. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

42 U. S. C. 407

[1] Sec. 407. Provides:

"The right of any person to any future payment under this sub-chapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."

42 U. S. C. 402(a)

Every individual who—

(1) is a fully insured individual (as defined in § 414(a) of this title),

(2) has attained retirement age (as defined in section 416(a) of this title), and

(3) has filed application for old age insurance benefits, shall be entitled to an old age insurance benefit for each month, beginning with the first month after August 1950 in which such individual becomes so entitled to such insurance benefits and ending with the month preceding the month in which he dies. Such individual's old age insurance benefit for any month shall be equal to his primary insurance amount (as defined in § 415(a) of this title) for such month.

42 U. S. C. 403

REDUCTION OF INSURANCE BENEFITS.

(b) Deductions, in such amounts and at such time or times as the Secretary shall determine, shall be

made from any payment or payments under this sub-chapter to which an individual is entitled, until the total of such deductions equals such individuals' benefit or benefits under section 402 of this title for any month—

(1) in which such individual is under the age of seventy-two and for which month he is charged with any earnings under the provisions of subsection (e) of this section;

OCT 19 1956

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 443

HARLEY A. SEYBOLD, WALTER S. YOUNG, CHARLES E. KLUEGEL, MILO S. BUCK, W. O. OLIVER and ARCHIE B. CALLENDER,

Petitioners,

vs.

WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and the BANKERS TRUST COMPANY,

Respondents.

HARRY C. BORDWELL,

Petitioner,

vs.

ILLINOIS BELL TELEPHONE COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and the BANKERS TRUST COMPANY,

Respondents.

BRIEF OF BANKERS TRUST COMPANY IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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STate 2-7434.

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1956.

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Respondents.

BRIEF OF BANKERS TRUST COMPANY IN OPPOSITION TO THE PETITION FOR CERTIORARI.

OPINIONS BELOW.

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 234 F. 2d 942, and is reprinted in an Appendix to the Petition for Certiorari. Pet. App. 40-48.

The Opinion of the District Court is reported at 136 F. Supp. 125, and appears at pp. 173-222 of the Record.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED.

There are no questions presented in connection with Bankers Trust Company.

STATEMENT.

American Telephone and Telegraph Company, Illinois Bell Telephone Company and Western Electric Company, Incorporated, entered into separate trust agreements with Bankers Trust Company, as Trustee, for the purpose of establishing a Trust Fund as a "Pension Fund" and each Company paid to Bankers Trust Company, as Trustee, sums of money to pay their several Pension obligations under Pension Plans adopted by them.

The trial court in its memorandum of decision stated:

> "The plaintiffs have acknowledged that Bankers Trust with which each of the Bell System companies has entered into a trust agreement, has fully met its duties under the agreement; and no independent relief is sought against it." (R. 175.)

The Court of Appeals in its opinion stated:

> "No question of breach of trust by Bankers is presented; it is a nominal defendant only, and is not included in the generic term defendants when used herein." (Pet. App. A, 43.)

The above findings of the Trial Court and the Court of Appeals are not questioned by the petitioners.

At the start of the trial of this case the court asked plaintiffs' attorney what evidence he would introduce directly against Bankers Trust Company, to which counsel replied:

"No factual evidence whatsoever." (R. 80.)

The footnote appearing on page 8 of petitioners' brief, making reference to Bankers Trust Company, is a gratuitous statement by petitioners' counsel not supported by anything in the record.

CONCLUSION.

Since no questions are presented with reference to Bankers Trust Company and since no independent relief is sought against it, we respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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OCT 22 1956
JOHN T. FEY, Clerk

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HARRY C. BORDWELL,

Petitioner,

vs.

ILLINOIS BELL TELEPHONE COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, AND THE BANKERS TRUST COMPANY.

Respondents.

BRIEF OF RESPONDENTS ILLINOIS BELL TELEPHONE COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND WESTERN ELECTRIC COMPANY, INCORPORATED, IN OPPOSITION TO PETITION FOR CERTIORARI.

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court (R. 173-222) is reported at 136 F. Supp. 125. The opinion of the Court of Appeals is reported at 234 F. 2d 942 and is reprinted in Appendix A to the petition for certiorari (Pet. App. 40-48).[1]

[1] References to the printed record below will be designated "R. ..." and references to respondents' appendix of exhibits will be designated "Resp. Ex. ..." The petition for certiorari will be referred to as "Pet. ..." Emphasis is supplied throughout.

JURISDICTION.

Petitioners seek further review in this Court under the provisions of 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the offset method of integrating private pension plans with the Social Security Act violates Section 207 of the Act, 42 U. S. C. § 407.

2. Whether the two courts below properly interpreted respondents' pension plans under applicable local law.

STATUTES INVOLVED.

The statutory provision involved is Section 207 of the Social Security Act, 42 U. S. C. § 407, set out in Appendix B to the petition (Pet. App. 49).

STATEMENT.

The petition for certiorari involves two actions brought in a federal district court by retired employees of Illinois Bell Telephone Company ("Illinois Bell"), American Telephone and Telegraph Company ("A. T. & T.") and Western Electric Company, Incorporated ("Western Electric") against those companies and Bankers Trust Company ("Bankers Trust"), trustee of the pension funds of the three telephone companies.[2] The actions were consolidated for trial, after which the district court wrote a detailed opinion finding the issues for the defendants (R. 174-222). Upon appeal, the Court of Appeals unanimously affirmed the district court's decision, adopting its

[2] The sole plaintiff in the action against Illinois Bell, Freeman S. Hurd, has not joined in the petition for certiorari. Petitioner Harry C. Bordwell, a former Illinois Bell employee, was not a party in the trial court, having been permitted to intervene for the first time in the Court of Appeals. (See Pet. App. 41-42.)

opinion and adding a "brief supplement" dealing with new matters raised on appeal (Pet. App. 45).

Illinois Bell, A. T. & T. and Western Electric are among the companies that make up the so-called "Bell System", and their pension plans are identical in all respects material to these cases. However, the companies are entirely separate corporate entities, and their pension plans are separate. On January 1, 1913, respondents[3] established comprehensive, non-contributory benefit plans, which provide among other things for pensions to employees upon their retirement after specified periods of employment. Such benefits under respondents' pension plans are referred to herein as "service pensions". The basic formula for computing the annual service pension for each employee who is retired with a pension is predicated on his length of service and wages.

In their actions, commenced in 1951 and 1952, petitioners attacked the provisions of the plans which since 1940 had provided for the offset of an amount equal to one-half of a retired employee's old age insurance benefits under the Social Security Act, 42 U. S. C. § 301 *et seq.*, against his service pension. Pension plans that adjust company pensions on the basis of Social Security benefits are commonly referred to as being "integrated" with Social Security, and the type of integration provided in respondents' plans is known as the "offset" type. This type of integration is by no means confined to respondents' plans. It has been adopted and accepted without question in numerous other private pension plans (R. 130-132).

The purpose of the Social Security offset and other forms of integration is, of course, to avoid duplication of costs and benefits that would otherwise exist between pri-

[3] "Respondents" will be used to designate Illinois Bell, A. T. & T. and Western Electric. It will not include Bankers Trust unless the context so indicates.

vate pension plans and the government system (R. 131). Most companies having private plans in effect when the Social Security Act was adopted found it necessary thereafter to amend their plans in order to avoid such duplication (R. 129), but respondents' pension plans had long anticipated and provided for just such an eventuality. As early as 1914, respondents' plans provided for offset of the full amount of government benefits or pensions against payments under the plans as follows:

> "In case any benefit or pension shall be payable under the laws now in force or hereafter enacted of any State or Country to any employee of the Company or his beneficiaries under such laws, the excess only, if any, of the amount prescribed in these Regulations above the amount of such benefit or pension prescribed by the law shall be the benefit or pension payable under these Regulations." (See Resp. Ex. 1, p. 19.)[4]

In 1935 the Social Security Act became law. Title II of that Act provided that, beginning in 1942, old age benefits would be paid by the federal government to persons who had reached age 65 and had retired after working for a specified period in covered employment. Title VIII of the Act imposed taxes upon employers and employees in equal amounts to provide funds for the payment of these old age benefits.

Enactment of the Social Security Act caused considerable concern both in Congress and among employees that private pension plans might be abandoned in view of the adoption of a general government old age pension system (R. 112-113). Respondents decided, however, not only to continue to maintain their pension plans but that, in view of the fact that Social Security benefits were to be financed by equal taxes on employers and employees, the plans

[4] This provision was Section 9(29) of the 1914 plan but was renumbered Section 8(27) by the 1940 amendments to the plans and was referred to in the courts below by that designation.

would be amended to provide that only one-half of such government benefits should be offset against company pensions, rather than the full amount. In 1936 respondents' presidents made public announcements to all employees to this effect (Resp. Ex. 7).[5]

In the summer of 1939, Congress enacted the Social Security Act Amendments of 1939, which, among other things, advanced the initial date for payment of old age benefits two years, from 1942 to January 1, 1940. In accordance with the 1936 announcement to employees, respondents therefore amended their plans effective January 1, 1940, to substitute a 50 per cent offset for the full offset, so long as the 1939 Act remained in effect unchanged (Resp. Ex. 2, p. 22). And again in 1949, when the 1939 Act was in the process of being substantially amended, respondents amended their plans to apply the 50 per cent offset to benefits under the amended Act, rather than reverting to the full offset as would otherwise have been required (R. 202).

Thus, since January 1, 1940, when Social Security benefits first became payable, respondents have offset an amount equal to one-half of the retired employee's Social Security benefit against his service pension, representing, in effect, the half paid for by the company through Social Security taxes. When Social Security benefits were increased effective September 1, 1950, under the Social Security Act Amendments of 1950, the offset of one-half of the increased benefits of course had the effect of reducing *pro tanto* service pension payments under the pension plans. This was specifically provided in the pension plans (R. 201-202). However, when Congress again increased Social Security benefits in 1952, respondents again liberalized their plans

[5] No immediate change in the plans was necessary since Social Security benefits were not to be payable until 1942, although Social Security taxes were imposed beginning in 1937.

by providing that service pensions of persons who had retired prior to September 1, 1952, should continue to be adjusted by an amount equal to one-half the lower benefit under the 1950 Act, while the service pensions of employees who retired on or after that date would be adjusted by one-half the benefit provided by the Act as in effect on the date of retirement. In consequence, no further adjustments were made in the pensions of petitioners and others retired before September 1, 1952, as would have been necessary but for the amendment.[6]

In the courts below petitioners made numerous arguments challenging respondents' application and administration of the pension plans over the past twenty years and also contended that the offset provision of the plans violates the Social Security Act. Both courts concluded that petitioners' claims under the pension plans were without merit and that the Social Security Act has no application to the provisions of private pension plans.

[6] While petitioners complain of reductions in service pension payments (Pet. 5), the fact is that due to increases in Social Security benefits, for which defendants and other employers pay one-half, and the fact that only one-half or less of current Social Security benefits have been offset against service pensions, petitioners have become entitled to steadily increasing retirement incomes. (See R. 181.)

ARGUMENT.

In urging this Court to grant certiorari, petitioners have listed seven questions for its consideration. One of these is reserved in the event certiorari is granted and most of the rest deal exclusively with matters of interpretation of respondents' pension plans, although petitioners have attempted to phrase them in a manner calculated to indicate that an interpretation of the Social Security Act is involved. They are contract questions governed by state rather than federal law. No contention is or can be made that the courts below decided these questions contrary to applicable state law. All of these questions were carefully considered by the district court and by the Court of Appeals, whose decision is not in conflict with any decision of any other court of appeals.

Petitioners, in their attempt to have this Court take jurisdiction, have injected into what is primarily a simple contract action one question which on its face involves federal law, namely, whether a pension plan which provides that the amount to be paid thereunder is to be determined in part by reference to benefits under the Social Security Act involves a "transfer" or "assignment" of payments under the Act contrary to Section 207.[7] Petitioners' contention is refuted by the plain language of that section. There have been no decisions contrary to that of the Court of Appeals, and in fact we know of no other case raising the question although the offset method of Social Security adjustment has been in operation in a great number of pension plans for over sixteen years. Thus petitioners' contention that

[7] This claim was not even made in the first Complaint filed in these cases but was added one week later by an amendment to the Complaint, apparently to supply a "federal question" since diversity of citizenship was lacking.

an important question of federal law requiring decision by this Court is presented is without merit.

I.

THE SOCIAL SECURITY OFFSET PROVISION IN RESPONDENTS' PENSION PLANS DOES NOT VIOLATE THE SOCIAL SECURITY ACT. (Pet. 7-22.)

The claim that the Social Security Act prohibits parties to private pension contracts from entering into an arrangement whereby an amount equal to a portion of the retired employee's Social Security benefit is offset against his company pension borders on the frivolous. Although restated in several different forms, petitioners' contention reduces itself to the argument that an employer is somehow forbidden from entering into a contractual agreement with his employees that the amount of their company pensions will depend, among other things, on the level of their Social Security benefits. This is said to amount to a "transfer of the economic benefits of OASI" contrary to Section 207 of the Act, 42 U. S. C. § 407 (Pet. 9-18) and an "interference by the employer with the action of Congress in providing a legislative remedy" (Pet. 18-22).

Petitioners do not contend that there has been an actual transfer or assignment of their Social Security benefits to respondents. Petitioners admit, as they must, that their Social Security benefits have been paid directly to them, and that not a single penny of such benefits has ever been paid to respondents. But they advance the theory that if the pension contract makes the receipt of the Social Security benefit the legal basis for a reduction in the amount which, but for the payment of Social Security, would otherwise be due under the pension plan, then there has been a shift *pro tanto* of the economic benefit of the Social Security payment, and this shift is a "transfer" within the meaning of Section 207.

In making this claim, petitioners are indicting not only these respondents but a major segment of American industry which, since the enactment of Social Security in 1935, has followed similar practices, as petitioners' counsel has conceded.[8] This in itself, under well-established authorities, is clear evidence that the interpretation of the Act urged by petitioners is without foundation.[9]

Because of the passage of the Social Security Act, private pension plans covering more than 90 per cent of all employees then under pension plans were amended by the companies to reduce benefits payable thereunder (R. 129-130). Some 80 leading companies (exclusive of Bell System companies) maintaining pension plans in 1935 subsequently incorporated Social Security offset provisions into their plans, and nearly 250 additional companies since 1935 have adopted pension plans embodying the offset principle. Most of these companies, unlike respondents, provide for the *full* offset of the Social Security benefit (R. 138).

A. Petitioners' Contention Is Contrary to the Plain Language of Section 207.

Section 207 provides as follows:

> "The right of any person to any future payment under this subchapter[10] shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."

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[8] (By Mr. Walk): "It is perfectly well known that American industry has operated with pensions, and that many of these pensions are integrated with Social Security. That is no secret. Everybody knows it" (R. 136).

[9] *Pennell* v. *Philadelphia & Reading Ry. Co.*, 231 U. S. 675, 680; *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524-525; *De Castro* v. *Board of Commissioners*, 322 U. S. 451, 463-464.

[10] The subchapter is entitled "Federal Old-Age and Survivors Insurance Benefits."

The plain meaning of this language contradicts petitioners' claim. There has been no transfer or assignment to respondents, at law or in equity, of the right of any person to any Social Security benefit, and there is no provision of respondents' pension plans for such transfer or assignment. Respondents have never received a penny of their retired employees' Social Security payments. There is not the slightest suggestion in the text of Section 207 that it is intended to prohibit employers and employees from agreeing that the level of pensions to be paid under a private pension plan will depend in part upon the employees' Social Security benefits. The clear and obvious purpose of Section 207 is to provide assurance that the Social Security payments themselves are in fact made to the beneficiaries to whom they are due, and to prevent creditors from obtaining the money by attachment, etc.[11]

Petitioners attack the offset provisions as resulting in "a shift of economic benefit" (Pet. 9-11), citing *United States* v. *Silk*, 331 U. S. 704, 712 and *Social Security Board* v. *Nierotko*, 327 U. S. 358. Neither decision has any discernible relation to the question here raised. In the *Silk* case the issue was whether the workers involved were covered by the Social Security Act at all, while *Nierotko* involved the question whether back pay granted under a Labor Board ruling should be treated as "wages" under the Social Security Act. The petitioners here have received all the Social Security payments to which they have been entitled, and respondents have paid all the Social Security taxes which have been due from them with respect to petitioners and all other employees. There is

[11] The judicial interpretations of Section 207 are of only limited significance with respect to the present case, but they are in accord with respondents' position that the section simply means what it says. See *Gardner* v. *Ewing*, 88 F. Supp. 315, 323 (S. D. Ohio), aff'd, 185 F. 2d 781, 784 (6th Cir.), jdg. re costs rev'd, 341 U. S. 321; *Beers* v. *Federal Security Administration*, 172 F. 2d 34, 36 (2nd Cir.), affirming 80 F. Supp. 183, 185 (D. Conn.).

thus no genuine issue as to petitioners' rights or respondents' obligations under the Social Security Act, and the cited cases have not the remotest bearing on the question petitioners seek to raise.[12]

Petitioners seek to convey the impression (Pet. 10) that somehow respondents have profited from the enactment of Social Security in that their pension accruals have been reduced by virtue of the offset provision. Even if this claim were relevant, the record shows that the trend of both pension accruals and Social Security taxes has been upward since 1936 for all three companies, and that combined pension accruals and taxes for Illinois Bell, for example, have risen from 2.68 per cent of payroll in 1936 to 9.59 per cent in 1954—an increase of over 350 per cent (R. 93f). Furthermore, it is more costly to the companies to provide a given amount of retirement income through a combination of Social Security taxes and pension accruals than through the pension plan alone (R. 99-100). The fact is, therefore, that, far from having "profited" by Social Security, respondents now pay far more both in percentage of payroll and total amounts toward retirement incomes for their employees through Social Security taxes and pension accruals than they did before the Social Security program was initiated.

[12] Petitioners also reach into the field of tax law in an attempt to support their plea that Section 207 of the Social Security Act should be applied to the indirect transfer of economic benefits claimed to have occurred by reason of the offset provision (Pet. 11-12). Petitioners cite two federal gift tax cases and one federal income tax case. But in the gift tax cases, there was no question that transfers had in fact occurred, and the only issue was when such transfers became completed gifts for purposes of the taxing statute. In the federal income tax case, the issue was whether a taxpayer had incurred a deductible loss from a sale of securities to his wholly-owned corporation. There was no statutory test of "transfer" involved.

B. Congress Contemplated and Sanctioned the Social Security Offset in Private Pension Plans.

Since the plain meaning of Section 207 of the Social Security Act furnishes no support to plaintiffs' contention that the Social Security offset provisions in defendants' pension plans is in violation of the Act, the matter could rest there.[13] If, however, there were any doubt as to the meaning of Section 207, the pertinent legislative history[14] establishes clearly that there was no intent to prohibit integration of private pension plans with Social Security. On the contrary, Congress has, from the beginning of Social Security, recognized the existence of such integration, including the use of the offset method, and has sanctioned it by its acquiescence in such integration while enacting many significant amendments to the Act. *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 544-545.

It is significant that in the legislative considerations of the original Social Security Act there was no reference to a possible application of Section 207 in case private pension plans should be integrated with Social Security, even though extensive attention was given to such integration. (See, *e.g.*, 79 Cong. Rec. 9273, 9529-35.) *United States* v. *American Trucking Association*, 310 U. S. 534, 546-547. In fact, there is abundant affirmative evidence that Congress contemplated that upon passage of the 1935 Social Security Act private pension plans would be integrated with Social Security.

The records of the hearings conducted by the congressional committees considering the original Social Security legislation disclose that Congress was repeatedly advised

[13] *Ex Parte Collett*, 337 U. S. 55, 61; *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485, 492.

[14] *Helvering* v. *Davis*, 301 U. S. 619, 641-642; *Shapiro* v. *United States*, 335 U. S. 1, 12 (note 13); *Ex Parte Collett*, 337 U. S. 55, 61-71.

that private companies could and would rely upon their employees' Social Security benefits as providing a portion of the employees' retirement income, with the company pension plan providing supplemental benefits.[15]

At the time of the Senate debates there was considerable fear expressed that companies with their own more liberal pension plans might discontinue them, on the reasoning that since they must support a government program, they would not continue to support their own private systems. However, the sponsors of the Social Security bill pointed out that employers with their own plans could integrate such plans with Social Security and thus would not have to pay any more in the overall than they had previously spent in maintaining their private systems alone (79 Cong. Rec. 9529-30).

Several years later, when Congress was considering the 1939 amendments to the Social Security Act, it was advised by the Chairman of the Social Security Board and by members of an advisory council appointed by the Senate Finance Committee that private pension plans had, in fact, been "superimposed on the basic Federal old-age insurance system" (Hearings on H. R. 6635, 76th Cong. 1st Sess. (1939), pp. 20-21). Indeed, at hearings before the House Ways and Means Committee attention was called specifically to the Bell System companies' proposal to

[15] For example, Dr. J. Douglas Brown, a member of the professional staff of the President's Committee on Economic Security, which drafted the original Act, testified in committee hearings:

"This particular program incorporated in the bill acts as a basic pension protection. It does not go anywhere near as high as some private pension plans, particularly in the case of higher paid employees.

"This is a social-insurance annuity program, not a private annuity program, *so that all of these more progressive companies who already have pension plans can merely permit this protection to offset the lower level of protection they are already affording* and then go beyond it if they are so inclined" (Hearings on H. R. 4120, 74th Cong. 1st Sess. (1935), p. 251).

adopt the 50 per cent offset for Social Security benefits (Hearings Relative to Social Security Act Amendments of 1939, 76th Cong. 1st Sess. (1939), pp. 2181-2183).

Again in 1949 and 1950, when Congress was considering the bill subsequently enacted as the Social Security Act Amendments of 1950, its committees were advised of the fact that private pension plans generally are integrated with Social Security, and that the increase in benefits under the Act would result in reduction of pension payments under offset plans (R. 209-210). Congress was advised by its expert advisory group, however, that this was a matter of bargaining between the parties and that there was not "any matter of public policy involved which requires action on the part of Congress" (Hearings on H. R. 2893, 81st Cong. 1st Sess. (1939), pp. 1539-1540). Accordingly, the Senate Committee Report on the 1950 Act states:

> "Another question which is not resolved by this bill but which will be a matter of increasing importance is the relationship of the public social-security program to private pension plans, particularly those now being established through collective bargaining to cover major groups of industrial workers." (Sen. Rep. No. 1669, 81st Cong., 2d Sess. (1950).)

In spite of this clear evidence to the contrary, petitioners argue as a separate proposition (Pet. 18-22) that the increased offset effective upon the increase in Social benefits under the Social Security Act Amendments of 1950 "frustrated the intention of Congress to legislate a remedy for the effects of inflation on the purchasing power of Social Security benefits" and that the Act was therefore violated. They refer to no particular provision of the Act, cite no supporting authorities and point to no legislative history in support of their claim. Rather, petitioners distort portions of the district court's opinion and make a number of assertions not supported by the record in what

is frankly an *ad hominem* argument. The court need only read the statements quoted by petitioners in their proper context (R. 209) to appreciate the distortion.

Affirmative congressional approval of integration of private pension plans with Social Security has been further evidenced by legislation providing a substantial federal income tax advantage to integrated private plans, and by re-enactment of the legislation after the Treasury Department had, through general regulations and a specific ruling on defendants' plans, approved such integrated plans.[16] Congress has provided that, in the determination of whether a pension plan qualifies for federal income tax advantages, Social Security benefits are to be considered together with payments under the private pension plan. (See 26 U. S. C. § 401(a); S. Rep. No. 1631, 77th Cong., 2d Sess., p. 137.) Treasury regulations and rulings have spelled out in detail how a pension plan may satisfy the requirements of the above legislation and in doing so have expressly recognized "offset plans" as constituting an approved method of integration. (See *e.g.*, Bureau Mimeo 6641, C. B. 1951-1, pp. 41 *et seq.*)

In taking these actions the agencies have carried out the decision of Congress that private pension plans integrated with Social Security are to be granted federal income tax advantages. Obviously, Congress would not have extended such tax relief in the case of pension plans which would be illegal under the Social Security Act.

In sum, the total absence of any reference in the Act to

[16] In view of congressional re-enactment in the 1954 Internal Revenue Code of the provisions of Section 165(a), after interpretation of those provisions by the Treasury Department through its regulations and rulings, "Under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law." *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 115. See also *National Lead Co.* v. *United States*, 252 U. S. 140, 146; *Lykes* v. *United States*, 343 U. S. 118, 127.

private pension plans in the light of the legislative history and subsequent actions of Congress, as the district court said, "leaves no doubt that Congress did not intend the Social Security Act to be the legal cause of invalidating a private plan that was integrated with the federal program" (R. 200).

II.

THE INTERPRETATIONS OF RESPONDENTS' PENSION PLANS BY THE COURTS BELOW PRESENT NO QUESTIONS FOR THIS COURT'S REVIEW.

Petitioners also attempt to bring before this Court questions of the interpretation of respondents' pension plans, despite the fact that only matters of local law are involved and that two courts below have resolved those questions contrary to petitioners' contentions (Pet. 22-39).

The only rights asserted by petitioners against respondents in this case are rights under the pension plans. While petitioners refer to their arguments as involving "questions of general law of great national importance" (Pet. 24), the fact is that the questions involve only the interpretation of the pension plans of these particular respondents under the evidence in this case and in the light of applicable state law.[17] Since both courts reached the same conclusion on the evidence, this Court would not in any event re-examine the issue. *United States* v. *O'Donnell*, 303 U. S. 501, 508.

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[17] In this connection, it is pertinent to note that in an action brought by two other retired employees of Illinois Bell in the Illinois state courts asserting the same contract cause of action as that advanced by petitioners, the court dismissed the action, stating that he "had carefully read Judge Hoffman's decision in the Federal Court in the case of *Hurd* v. *Illinois Bell Telephone Company, et al.*, 136 F. Supp. 125, and agreed with Judge Hoffman and adopted Judge Hoffman's decision as the decision in this case." *Anderson* v. *Seaton, et al.*, No. 52 C 13844 in the Circuit Court of Cook County, R. 101 (decided May 15, 1956).

While one such contention (Pet. 22-23) is presented in the guise of an interpretation of the Social Security Act, this is obviously a subterfuge. It is clear that the question necessarily presented is whether the *plans* provide for the offset in the circumstances referred to, not what the Act provides. The district court concluded, and the Court of Appeals concurred, "that the defendants' 'covered employment' practice was proper *under the terms of the Plan* and that it reflected the reasonable, as well as the known, interpretation of Section 8(28) [of the Plan]" (R. 218).[18]

The claim that the court below departed from the accepted and usual course of judicial proceedings (Pet. 35-39) represents nothing more than reargument of the contentions advanced by petitioners earlier in their petition, this time taking statements of the Court of Appeals as points of departure. No contention is or could be made that the proceedings in both courts were not conducted in the accepted and usual manner. By emphasizing certain statements of the court, quite apart from their context, petitioners seek to convey a wholly erroneous impression of its decision. Indeed, the comment that the alleged transfer of economic benefit "poses a problem within the realm of moral evaluation, not legal," which petitioners stress (Pet. 38-39), follows an analysis by the court demonstrating that, in reality there is no such transfer, and that the offset policy "violates neither the letter nor the spirit of the Social Security Act" (Pet. App. 46-47).

[18] The provisions of the Social Security Act cited by petitioners were relevant only because respondents' pension plans were keyed to the language of the Act.

CONCLUSION.

The sole federal question presented, namely, whether the Social Security offset provision of respondents' pension plans violates Section 207 of the Social Security Act, is wholly without substance. There is no conflict of decisions, and the claim has not even been made heretofore in any reported case, despite widespread adoption of offset provisions in industrial pension plans during the past 20 years. The other questions raised involve merely the interpretation of respondents' pension plans, as to which both courts below ruled adversely to petitioners, and are not of general importance.

The petition fulfills none of the standards under which this Court exercises its certiorari jurisdiction and should be denied.

Respectfully submitted,

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FILED
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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 443

HARLEY A. SEYBOLD, WALTER S. YOUNG, CHARLES E. KLUEGEL, MILO S. BUCK, W. O. OLIVER and ARCHIE B. CALLENDER,

Petitioners,

vs.

WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and the BANKERS TRUST COMPANY,

Respondents.

HARRY C. BORDWELL,

Petitioner,

vs.

ILLINOIS BELL TELEPHONE COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and the BANKERS TRUST COMPANY,

Respondents.

PETITION FOR REHEARING OF DENIAL OF APPLICATION FOR A WRIT OF CERTIORARI.

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Opening Statement:

Petitioners believe they can briefly demonstrate within Rule 58 (b):

1. The national significance of the principal legal issues in this litigation and their nation-wide economic implications. The suit was prompted by the 1950 action of the Bell

System in further drastically reducing for the second time the pensions of over 5,000 men and women pensioners of which the plaintiffs were, in a real sense, their nominees. (R. 39, par. 9)

2. The relationship of a review by this Court to the proper administration of justice even in the absence of a direct conflict with another Court of Appeals ruling.

3. The arbitrary departure by the opinions below, particularly the 48 page opinion of the District Court (Tr. p. 174-222) from principles long established by this, other federal and state courts. The brief opinion of the Court of Appeals which accepted the District Court rulings on all points reveals a failure to appreciate the grave dangers to law and public policy in permitting the District Court's opinion to stand *without even a single correction.*

4. The necessity at the earliest possible moment of clarifying the legal rights of the nation's pensioners whose economic and social problems represent one of the most serious concerns of state, local, and the federal government. An important aspect of these problems has been presented for this Court's consideration in this case after six years of litigation. The opinion of the District Court (with which we otherwise disagree) recognizes the comprehensive and exhaustive study of their legal problems (R. 222) made here by plaintiffs counsel who devoted over 10,000 hours to this case.

It is for these reasons that we ask this Court to consider the following additional grounds for allowance of the writ or to remand the cause for the purpose of a hearing en banc under Sec. 46 (c).[1] U.S.C.

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[1] The rules of the Seventh Circuit Court of Appeals make no provision for hearings under Sec. 46 (c) U. S. C.

Three basic issues are now paramount in this litigation, (1) the question of conflict with the Social Security Laws, (2) the denial to the pensioners of the vital procedural right to combine as a group under Rule 23(a) (1) for their common defense and (3) the right to deduct Social Security under the pension plans themselves. The petition for certiorari dealt largely with the questions arising out of the application of Federal statutes and therefore may have created the mistaken impression that no significant question was being raised under the other issues. The lower court's conclusions represent far more than serious mistakes in the interpretation of the pension plans or Rule 23. They constitute an arbitrary disregard of principle long approved by this and other federal courts and their review by this Court is essential to prevent a grave miscarriage of justice which will affect Bell pensioners and workers in every state of the Union.

I.

THE TRIAL JUDGE FAILED TO FULFILL HIS ASSURANCE THAT HE WOULD BE BOUND BY EARLIER RULINGS OF HIS PREDECESSOR AND ALSO TO GIVE EFFECT TO PROPER PRINCIPLES IN RULING THIS WAS NOT A TRUE CLASS SUIT.[1]

It is obviously a matter of the utmost importance to pensioners generally that to the extent to which they have legal grievances they should be able to combine for the purpose of litigating their claims. Here pensioners are retired under an identical pension contract and they share an interest in the same trust fund. Such a common interest in the plan was recognized by the District Court during the

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[1] This point was reserved but not discussed in the original petition for *certiorari* (p. 2).

early stages of the litigation. The Bell System Pensioners Association and the officers who were also pensioners but some of whom were not plaintiffs sought to intervene and be made parties. The District Judge (La Buy) in rejecting their petition held on May 5, 1952 that the original plaintiff already represented all members of the class when he said:

> "The members of this Association are already represented by the original plaintiff because they are members of the class which the main action was brought to protect—that is, retired employees receiving pension benefits from defendants."

The case was later transferred and tried before Judge Hoffman. During the trial, R. 91, he said:

"The Court: May I interrupt to ask this question as a matter of law?

> It is my impression that rulings made along the line here when another Judge has had the case become part of the law of the case, and that I am bound by those rulings even though at this time I might reach a different conclusion."

The Trial Judge in contradiction to such ruling held this was not a true class suit. (R. 186, 187). If the lower court's opinion is allowed to stand pensioners will not be able to enjoy the same procedural rights such as are given for example to holders of insurance contracts, *Supreme Tribe of Ben-Hur* v. *Cauble et al.*, 225 U. S. 356 or many other classes under Rule 23(a) (1).

Not only do the pensioners claims involve common questions of law and fact, they are here as beneficiaries of an express trust and *Boesenberg* v. *Chi. T. & T. Co.* 128 F. 2nd 245 (CA7) recognizes such suits as true class suits. That the Bell pension contract is part of the trust governing instrument follows from defendants' own admission. In qualifying under Sec. 165 of the Revenue Act of 1936 the

defendants made the following representation to the Bureau of Internal Revenue:

> "It is apparent from these recitals that the Plan, the Trust Agreement and the Trust Extension Agreement must be read together. The Plan is definitely a part of the 'trust instrument'." (Plf's Exh. 94, Plf's App. p. 34).

and the Bureau itself ruled:

> "The plan is in reality a part of every pension trust agreement". (p. 34 Plf's App.).

A large group of pensioners suing under an identical contract for an accounting of an identical trust fund ought not to be denied the procedural benefit of concerted action in a true class suit which has been allowed business group interests even when these arise under separate contracts. *Weeks* v. *Bareco Oil Co.* (125 F. 2nd 84).

The inconsistency and lack of realism in denying that this is a true class action appears from the ruling (234 F 2nd 942) permitting petitioner Bordwell to intervene where the Court of Appeals said "This cause is fraught with elements of possible prejudice to petitioner and other pensioners similarly situated." (p. 42 Petition For *Certiorari*).

II.

THE TRIAL COURT REPEATEDLY IGNORED THE PLAIN LANGUAGE OF THE CONTRACT, THE COURT OF APPEALS HAS DECLINED TO MAKE AN INDEPENDENT EXAMINATION OF THE ISSUES.

1). The contract specifically limits the offset to payments made by the Bell System itself in discharge of a statutory liability. The original plan in 1913 clearly shows this.

> "In case any employee or his beneficiaries shall be entitled under the laws of any State to any compensa-

> tion, pension or other benefit greater than that herein provided, the amount paid to the employee shall be that prescribed by statute. *The Committee are authorized to pay the amount of such liability* in the manner prescribed by law instead of in accordance with the provisions contained herein. In case the statutory liability is less than the Company's liability hereunder, the Committee may make the payments required by law and shall pay to such employee or to those persons entitled to take hereunder the excess of the amount payable hereunder above the amount so paid in accordance with law." (Plf. App. p. 13, Sec. 8 (32)).

The plan was revised in 1914 but did not change the basic intention of applying the offset only to company payments: "The amounts payable by the Company under any law as aforesaid . . ." is how the 1914 formulation proceeds. The respondents have admitted that as to the plaintiffs (all but one of whom was employed in 1913) there have been no adverse changes in the plans since 1913. They said;

> "The specific or formal consent of an employee who has accepted the terms of the plan to changes in the plan is required only when the changes adversely affect his rights to any benefit or pension to which he may previously become entitled under the plan. *No such change has ever been operative.*" (R. 84).

The Courts did not hold defendants to their basic admission made under oath.

2). The offset applies only to "benefits or pensions" payable by the Company under a statute. "Benefits" is a term restricted by the contract to payments for sickness, disability and death, as the trial court specifically admitted. (R. 195). The trial court was therefore forced to hold that OASI is a "pension" payable under the law of the United States. This holding is contrary to all authority.

> *Dismuke* v. *United States,* 297 U. S. 167.
> *Lemly* v. *United States,* 75 F. Supp. 248.
> *Anderson* v. *United States,* 205 F. 2d 326.
> *Deaney* v. *The Linen Thread Co.,* 118 A. 2d. 28.

3). The 1913 plan (from which no adverse changes have been or could have been made as to these plaintiffs) limited the offset to payments made under the laws of a "State".

This is expressly shown on the preceding two pages in the first sentence of the 1913 plan quoted there.

"State" was later changed to "any state or country".

Later changes in the plan extending the offset to payments made under Federal statutes are without legal effect. The impropriety of changes by the offeror in the offer of a unilateral contract is universally recognized:

> "the offer contains by implication a subordinate offer to keep the main offer open for a reasonable time in consideration of the beginning of the offer by the offeree . . . A collateral contract to keep an offer open is in effect specifically enforced by holding any attempt to revoke it ineffectual, so that the offeror becomes bound from the time performance is begun by a contract, liability upon which is conditional on the completion by the offeree of the requested performance within the time stated in the offer, or, if no time was there stated, within a reasonable time. This view has been adopted in the Restatement of Contracts (Sec. 45). 'If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional upon the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.' Williston Contracts, Sec. 60-A, pp. 170-1."

The courts below have not passed upon this issue at all.

4). The contract limits the offset to statutory payments made to an "employee". But the plaintiffs are not employees of the Bell System. After retirement they ceased to be employees. "A retiring pensioner is not an

employee. He ceased to be an employee when he was pensioned." *Schofield* v. *Zion Coop.* 39 P. 2d. 342, 346. Moreover the contract itself specifically excludes pensioners from the definition of employees:

> "The word 'Employees' shall mean those persons who receive a regular and stated compensation from the company other than a pension or retainer." (Plf. Ex. 51, Def. App. #2).

The tortuosities of reasoning by which the trial court has tried to avoid the plain dictates of the contract shows the extreme limits to which it has gone in holding for the Bell System on this issue. (R. 205, 206) Not even the attorneys for the Bell System itself on trial or in their briefs had the temerity to offer the rationalization by which the trial judge evaded the plain requirement that the offset be limited to payments made to "employees".

III.

THE LOWER COURTS HAVE IGNORED THE BASIC PROPOSITION THAT CONTRACTS WHEN DRAWN BY THE EMPLOYER AND HIS ATTORNEYS ARE TO BE CONSTRUED MOST STRONGLY AGAINST HIM; BUT HAVE RESOLVED ALL DOUBTS IN FAVOR OF THE BELL SYSTEM.

The contract and the several amendments thereto here were drawn by the Bell System and promulgated without any consultation with its pensioners or employees and without any collective bargaining with them. For a period of at least seventy-five years, from *National Bank* v. *Insurance Co.*, 95 U. S. 673, 678 to *Ullman* v. *Sunset-McKee Co.*, 221 F. 2d. 128, 133, it has been unquestioned law of the Federal Courts that doubts arising out of the construction of an ambiguous contract must be resolved against the employer

or other persons drafting the agreement. This Court in the National Bank Case, said:

> ". . . When a policy of insurance contains contradictory provisions or has been so framed as to leave room for construction . . ."

the Court will adopt a construction against the Company which prepared it for

> ". . . its attorneys, officers, or agents prepared the policy . . ."
>
> "It is its language which the court is united to interpret, and it is both reasonable and just that its own words should be construed more strongly against itself."

This principle applicable to insurance contracts was specifically held applicable to these Bell pension plans, *Western Union Tel. Co.* v. *Hughes*, 228 Fed. 885 and to other pension plans in the *Ullman* case, 221 F 2d. 128, 133.

A few examples, symptomatic of the whole tenor and disposition of the trial's court's opinion, will show how that court has openly and systematically flouted that principle.

1). The contract provides that the amount of the pension be determined on retirement. But one of the principal questions in the case is whether the contract requires that amount to be calculated once and for all at that time or whether the pension determined on retirement may be redetermined thereafter. The plaintiffs marshalled a list of contract provisions which were compatible only with the view that the contract permitted only a single determination at retirement, and they showed that the incapacity of the company to redetermine the amount so calculated followed from the logical scheme of the plan itself. And the plaintiffs further argued that if the ambiguity were still unresolved, it should be decided in favor of the pensioner on the principle of *National Bank* v. *Insurance Co.*, 95 U. S. 673, 678.

The trial judge without answering any of the plaintiffs' arguments contented himself with accepting the bald assertion of the defendant, without any proof, that the contract clearly provided for the recalculation of pensions at any time after retirement.

2). At retirement each pensioner was sent a closing letter informing him of the amount of his pension from retirement to age 65 and his pension commencing age 65. Here are the letters sent to Plaintiff Buck, whose pension was reduced first from $90.72 to $69.12 per month and six years after retirement on September 1, 1950 again reduced to $57.27 per month. These are of course typical of other pensions. (Pfs. Ex. 46).

June 2, 1944

"Mr. Milo S. Buck
Long Lines Plant Department
American Telephone and Telegraph Co.,
Pittsburgh, Pa.

Dear Mr. Buck:

This is to advise you that the following resolution has been adopted by the Long Lines Department Benefit Committee with respect to your retirement:

RESOLVED: That a service pension at the rate of $90.72 per month, payable from the Pension Fund, be authorized to Milo S. Buck, Plant Department, Pittsburgh, Pa., effective July 1, 1944.

According to the records of this Company, you will be entitled, upon application, to monthly Primary Insurance Benefits under the Social Security Act Amendments of 1939, beginning with the month of July, 1944. The amount of such benefits, based solely on your Bell System wages and service, will be $42.47 per month, and, as provided in Section 8, Paragraph 28 of the Plan, one-half of this monthly benefit, or $21.23, will be deducted from the service pension of $90.72 per month, stated in the above resolution, so that the net amount payable to you as service pension, beginning July 1, 1944, will be $69.49 per month. *These amounts may be subject to slighi modifications when finally computed* at the

date of your retirement and you will be advised of such damages, if any, at that time.

Will you kindly sign the enclosed card and return it to this office. Will you also advise us of the address to which your pension checks should be sent and the address to which other communications are to be forwarded.

Yours very truly,

N. R. KUEHNER
Secretary,

Long Lines Department Benefit Committee.

(Plf. Ex. 67)

July 20, 1944

Mr. Milo S. Buck
2106 Vodeli Street
Pittsburgh 16, Pa.

Dear Mr. Buck:

On June 2, 1944, we wrote you regarding your service pension and stated that according to our records the amount of benefits under the Social Security Act, based solely on your Bell System wages and service, would be $42.47 per month and that one-half of this amount, or $21.23, would be deducted from your service pension of $90.72 beginning July, 1944.

The final computation, however, as indicated on the enclosed Form P. F. 26 shows that the Primary Insurance Benefit based solely on Bell System wages and service will be $43.20 instead of $42.47 per month and accordingly, the deduction will be $21.60 instead of $21.23 per month so that the net amount payable as a service pension will be $69.12 per month beginning July, 1944.

I am also enclosing a Form OAC-1001, Statement of Employer, for your use in making application for benefits under the Act. You may retain the Form P. F. 26 for your records if you wish to do so.

Yours very truly,

M. R. YONKMAN,
Assistant Secretary,
Long Lines Department Benefit Committee.

RB
Enclosure
Copy to EFL"
(Plf. Ex. 69)

The plaintiffs argued that the reservation in explicit terms at the time of retirement of a power to change the amount of pension at age 65 implied an exclusion of any power to make another and later redetermination of that amount on the principle of *expressio unius est exclusio alterius.* The trial court not only completely ignored this argument; it mistated the facts by asserting that the final letter of retirement incorporated a reference to a power in the defendants to change the service pension whenever OASI was changed. (Tr. 208). Such a reservation of power simply isn't there. On the contrary the letters of retirement specifically state that they constitute a "final computation".[1]

3). At page 222, the Court said it gave "considerable weight to defendants' expressions and that every reasonable step has been taken to inform them" (employees). But here again only the defendants' evidence was considered and given weight. For example (Ex. 107), Pfs. App. p. 48, contained a quotation from defendants' slide film where a defendant narrator said:

> "For example, on an $80 telephone pension, you receive $30 a month until you're 65. Now, let's suppose

---

[1] About 5,000 pensioners of the Bell System suffered a second pension reduction in 1950. The number of pensioners of the defendants alone whose service pensions already subject to Social Security reductions found their service pensions further reduced commencing with September 1, 1950, were as follows:

Illinois Bell	527	out of	805
American Telephone & Telegraph	392	" "	543
Western Electric	559	" "	1023

(R. pp. 87, 88)

> your Social Security benefit is $30 a month. From age 65 on, your pension would be reduced by $15, that's the amount the Telephone Company put up the money for. *You'd then get $65 a month for the rest of your life from the Telephone Company . . .*"

Could there be a more specific representation that only one reduction would be made?

4). The readiness of the court to capitalize on any semblance or shred of evidence favoring the Bell System while explaining away the explicit language in the contract or strong implications unfavorable to the defendants is nowhere more apparent than in the use it has made of a letter of one of the plaintiffs. (Hurd) (R. 196). Hurd had said (Dfs. Ex. 30) that the offset would be justified *if* it were limited to the amount contributed by the Bell system in the form of payroll taxes, a position which would result in the refund to them of 90% of the amount claimed by the plaintiffs. The concession was quoted by the trial court with great eclat; but Hurd's qualification was suppressed.

Moreover the trial judge has held that this proceeding is no true class suit, because the pensioners lacked a "common interest". How then could the judge consistently treat a supposed admission by one of them as having any relevant, (let alone controlling) effect on the legal interest of the other plaintiffs? Here again by palpable misquotation and by sheer logical irrelevance the trial court has openly displayed its disposition to uphold the Bell System's construction of the pension contract at any cost.

IV.

CERTIORARI WILL BE GRANTED, EVEN IF THE ABSENCE OF CONFLICT IN THE CIRCUITS, WHERE IT CAN BE SHOWN AS A PRACTICAL MATTER THAT SUCH A CONFLICT IS UNLIKELY TO ARISE.

In *Schriber* v. *Cleveland Trust Co.*, 305 U. S. 47, 50 this court granted certiorari after initial denial where it was apparent that a conflict of opinion among two courts of appeal were unlikely for economic reasons. This same principle is applicable here. This suit was instituted originally in the nature of a test suit on behalf of a national group of Bell System pensioners by a few plaintiffs who were nominees of the group. Paragraph 9 of the Seybold Complaint (Tr. p. 39) states:

> "For the purpose of protecting themselves against the arbitrary action of the defendants and supporting the prosecution of this suit, plaintiffs in this suit, plaintiffs in the *Hurd* Case *(Hurd* v. *Illinois Bell Telephone Company, et al.)*, No. 51-C-577, and over 2,000 retired employees of almost every associated Bell System Company, residing in nearly every state in the United States, have joined together in a non-profit organization, 'The Bell System Pensioners Association, Inc.' "

Considering that this suit has been pending for about 6 years, that the pensioners are old men and women of small means, that this suit required the expenditure of thousands of hours of attorneys' time, that the initial expense of litigation has had to be met mainly by collecting a large number of small contributions, it is apparent that a number of suits could not have been filed in order to take advantage of this court's rule allowing conflict between Courts of Appeal as a ground for the granting of certiorari. The denial of certiorari here because of an absence of such conflict means that for all practical purposes the decision of the lower courts here, unless this court now intervenes, may well be a

final determination of a basic contract between one of the countries largest corporate employers and all of its pensioners and employees.

The importance of a review by this court is all the more urgent here because the Court of Appeals limited itself to a general expression adopting all of the trial court's positions and indicated that it had made no independent analysis of the issues. 234 F 2d 942. In view of the economic importance of the Bell pension contract to over half million people, and of the circumstance that their interest, as a practical matter, will otherwise be concluded by the trial court's judgment, it is respectfully submitted that a review of the issues by this Court is essential in the interest of justice and that a writ of certiorari should issue as prayed for here and in the original petition filed in this cause.

Conclusion.

For these reasons we request this Honorable Court to grant this petition for rehearing and grant a writ of certiorari or in the alternative remand this Cause for a hearing en banc under Sec. 46 (c) U.S.C. for an independent determination by the Court of Appeals of the issues in this cause.

Respectfully submitted,

MAURICE WALK,

HARRY R. BOOTH,

Attorneys for Petitioners.

CERTIFICATE

Harry R. Booth, one of the attorneys of record for the petitioners, states that this petition for rehearing is filed in good faith and not for the purpose of delay and otherwise conforms to Rule 58 (b) of this Court.

HARRY R. BOOTH.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 443.

HARLEY A. SEYBOLD, WALTER S. YOUNG, CHARLES E. KLUEGEL, MILO S. BUCK, W. O. OLIVER and ARCHIE B. CALLENDER,

Petitioners,

vs.

WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and the BANKERS TRUST COMPANY,

Respondents.

HARRY C. BORDWELL,

Petitioner,

vs.

ILLINOIS BELL TELEPHONE COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and the BANKERS TRUST COMPANY,

Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

and

BRIEF OF ALLIANCE OF INDEPENDENT TELEPHONE UNIONS, AS *AMICUS CURIAE,* IN SUPPORT OF PETITION FOR REHEARING OF DENIAL OF PETITION FOR A WRIT OF CERTIORARI.

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Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE.*

To The Honorable, The Chief Justice of The United States and The Associate Justices of The Supreme Court of The United States:

Now comes Alliance of Independent Telephone Unions, and respectfully moves this Court, pursuant to Rule 42, (1), of the Rules of this Court, for leave to file the accompany-

ing brief in this case as *amicus curiae*. The consent of the attorney for the petitioners herein to the filing of this brief has been obtained and filed with the Clerk of the Court. The consent of the attorney for the respondents was requested but was refused. The interest of Alliance of Independent Telephone Unions and its reasons for asking for leave to file the brief *amicus curiae* which are more fully set forth in annexed brief, may be summarized as follows:

(1) The movant represents 125,000 Employees, all of whom are covered by a pension contract identical to that involved herein, and (2) the annexed brief presents important data pertinent to the determination of the issues which have not hitherto been made known to the Court.

Respectfully submitted,

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Dated: January 7, 1957.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 443.

HARLEY A. SEYBOLD, WALTER S. YOUNG, CHARLES E. KLUEGEL, MILO S. BUCK, W. O. OLIVER and ARCHIE B. CALLENDER,

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Respondents.

HARRY C. BORDWELL,

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vs.

ILLINOIS BELL TELEPHONE COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and the BANKERS TRUST COMPANY,

Respondents.

BRIEF OF ALLIANCE OF INDEPENDENT TELEPHONE UNIONS, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR REHEARING OF DENIAL OF PETITION FOR A WRIT OF CERTIORARI.

The Interest of Alliance of Independent Telephone Unions.

The issue before the Court is the validity under Social Security Laws and the Bell System pension contract of the

Bell System Companies' reduction of employees' pensions by offsetting therefrom an amount representing one-half the retired employees' OASI benefits. In that issue, the Alliance of Independent Telephone Unions has a direct interest.

We are a federation of 11 labor unions in the telephone industry whose members are employed by various Bell System Companies in New York, Pennsylvania, Massachusetts, Connecticut, Rhode Island and Delaware. With one exception, these companies are all wholly owned by the American Telephone and Telegraph Company. We represent approximately 125,000 employees, all of whom are covered by a pension contract identical to that involved herein. These employees are subject upon retirement to suffer the same diminution of pension rights by their respective Bell System employers, the legality of which petitioners request this Court to review.

The following is a compilation of bargaining units, member unions and Bell System Companies covered by our collective bargaining agreements:

Bargaining Unit	Labor Union	Company
Traffic Dept.....	Pennsylvania Telephone Union	Bell Telephone Company of Pennsylvania
Traffic Dept.....	Telephone Traffic Union Upstate New York	New York Telephone Company
Traffic Dept.....	Telephone Traffic Union of New York	New York Telephone Company
Traffic Dept.....	United Telephone Workers of Delaware	Diamond State Telephone Company
Plant Dept.....	Federation of Telephone Workers of Pennsylvania	Bell Telephone Company of Pennsylvania

Bargaining Unit	Labor Union	Company
Plant Dept.....	United Telephone Organizations	New York Telephone Company
Plant Dept.....	International Brotherhood of Telephone Workers	New England Bell Telephone Company
Plant Dept.....	United Telephone Workers of Delaware	Diamond State Telephone Company
Accounting Dept....	Upstate Telephone Employees Association	New York Telephone Company
Accounting Dept....	Federation of Telephone Workers of Pennsylvania	Bell Telephone Company of Pennsylvania
Commercial Dept...	Pennsylvania Telephone Guild	Bell Telephone Company of Pennsylvania
Commercial Dept...	Telephone Commercial Union, Upstate New York	New York Telephone Company
All Departments....	Connecticut Union of Telephone Workers, Inc.	Southern New England Bell Telephone Company

The member unions of the Alliance of Independent Telephone Unions have endeavored for many years, without success, to persuade the Bell System to cease the practice of depriving employees of their full industrial pension rights by the device of latching on to wholly independent OASI benefits.

Bell System Companies charge the cost of maintaining pensions to operating expenses. Regulatory bodies have approved such charges upon the ground that they were in the nature of deferred wages. Such charges were also exempted by law from taxation. The exemptions were seriously challenged by the Treasury Department in 1942

because (a) the Pension Plan vested no rights in employees until they fulfilled age and service requirements, (b) it was discriminatory in its treatment of employees, giving executives exceedingly generous allowances and non-supervisory employees invidiously small hand-outs (the Treasury Department wanted to set pensions at a maximum of $7,500 for tax exemption purposes), and (c) it gave unions and employees no representation whatsoever in the administration of the Plan.

It is cruelly ironic that the Plan was then saved from destruction by the intercession of the Alliance's predecessor, The Eastern Seaboard Alliance of Telephone Unions, The National Federation of Telephone Unions and other Bell System Unions, all of which were rushed to Washington by the Companies to save the day.

Nevertheless, the Companies continued to make unilateral and uniform changes in the Bell System Pension Plan. Though there have been many changes of substance, none has ever resulted from collective bargaining with any union.

The recent change, undoubtedly initiated because of this litigation, which reduces the impact of social security increases on Bell System pensions so far as non-pensioners are concerned, might very well be terminated at the end of any contract period. In fact, the Bell System Companies could, if successful in the case at bar, amend the Plan at the end of any contract period by providing for the deduction of full Social Security benefits from pension allowances.

Neither this Court nor any other should indulge in the self-assurance that injustices or imbalances in the Bell System Pension Plan could be corrected by the unions through the usual exercise of economic power. The strike instrumentality has become *brutum fulmen* in the tele-

phone field. The dial and a great variety of other miraculous automatons plus a huge back-log of strike breaking supervisory employees have made the Bell System impervious to pressures of this nature. And the monopolistic character of its business (only recently assured by a government arranged consent decree) has made it impregnable.

The last haven of refuge for the beleaguered Bell System pensioners and potential pensioners is, therefore, this Court.

If the decisions below are permitted to stand and certiorari is denied the petitioners, the contractual and OASI statutory rights of the 125,000 employees whom we represent, as well as the remaining 575,000 employees of the American Telephone and Telegraph Company and its Bell System subsidiaries, to full and undiminished industrial pensions will have been irretrievably lost.

Moreover, these decisions will have shattering implications with respect to similar rights of many millions of workers now covered by pension plans which involve the application of the Social Security Law. In New York State alone, where over 50,000 employees of the New York Telephone Company belong to our member unions, there are several million workers covered by such plans. 23,000 pension plans have qualified under Treasury regulations for tax purposes and they cover 14,000,000 workers (New York Times, Jan. 2, 1957, page C89).

To this huge and growing army of industrial workers, the questions presented by this case are of such immediacy as to fully warrant review, even in the absence of conflict in the Circuits, particularly since the conflict may never arise and in the meantime, in any event, unjustifiable and untold hardship is being imposed on so many defenseless human beings.

ARGUMENT.

POINT I.

The Bell System deduction of any part of Social Security Benefits from pensions constitutes a repudiation of respondents' implicit obligation to pay pensions in full.

The telephone investigation by the Federal Communications Commission pursuant to Public Resolution No. 8, 74th Congress, revealed the position taken by the various members of the Legal Department of the American Telephone and Telegraph Company. For example, on October 2, 1926, Mr. Roscoe T. Holt, one of the attorneys in the Legal Department, submitted a memorandum covering the legal obligations of the Bell System Companies under the Plan. He said in part as follows:

> "Payments of benefits under the schedules of the plan have been made in full since its inception and while there is the limitation above noted to the liabilities of the several companies, in some cases the companies concerned have gone further than the plan required so that to this extent a moral obligation to provide for the payment of the pensions in full has already been recognized. As a practical matter in its relations with its employees the companies regard the obligation to pay pensions in full as binding upon them. The employees so regard the situation. They are told of the plan and are given the pamphlet which gives in detail the provisions of the plan. They understand that they are to have this insurance as part of the compensation of their employment and do not have in mind the limitation of the liability which is set forth in the plan either when entering the employment or in continuing the employment when

other employment may have been offered to them. Under the circumstances the companies having embarked with the pension plan intend to carry it through regardless of the limitation."

In 1932, Mr. J. H. Peck, another attorney in the same Legal Department, submitted a memorandum containing the following:

"Here is a contract made with every employee who enters the service, which is in substance that if he continues in the service for the requisite period he will receive a pension in the amount specified, and that the Company, through the trust fund and periodic additions thereto, will have on hand the necessary amount in the fund when the time for payment arrives. Obviously, no employee acquires the right to any payment until he has served the necessary term of employment. But, in the meantime, he has a contractual right to compel the company to take the necessary steps to accumulate the fund and to maintain the fund for his protection until the time for payment arrives."

• • • • • •

"If at any time it were to revoke the Plan and the Pension Trust Agreement, in order to withdraw any amount from the Trust Fund, it would have to show that there was at that time in the fund a sufficient amount of money to pay all pensions theretofore granted, and all pensions which employees were then entitled to receive at their own request, and in addition to this, that there would be left in the fund an amount sufficient to cover the accruals for other employees that it had agreed to make, that is to say, that the periodical accruals and payments to the fund, mathematically calculated, had been sufficient to meet the contractual requirements for the years since the accruals were to begin. Any employee would have such a right in the maintenance

> of the fund as would be sustained by a court of equity if the Company should attempt to deprive him of the protection for the payment of his pension to which he is entitled under the contract."

In a memorandum dated December 29, 1925, Mr. N. T. Guernsey, vice-president and general counsel of the American Telephone and Telegraph Company, indicated that the changes then proposed in the Plan would create at least a moral obligation to provide for the payment of pensions in full.

POINT II.

The Bell System deduction of part of Social Security benefits defeats the original purpose in setting up the pension plan.

Theodore N. Vail, in announcing the Plan to Bell System employees on January 1, 1913, and to the public in the Company's annual report for 1912, said:

> "The intent and purpose of the employer in establishing a plan of benefits, is to give tangible expression to the reciprocity which means faithful and loyal service on the part of the employee, with protection from all the ordinary misfortunes to which he is liable; reciprocity which means mutual regard for one another's interest and welfare."

Three years later, the American Telephone and Telegraph Company's annual report, after commenting on compensation in cases of industrial accident, continued:

> "• • • we believe it is no more than simple justice that the men and women who devote their working lives to the telephone service should be assured of some income when they are sick or come to old age,

> and that some immediate provision should be made for those dependent on such workers when they die in the service. If justice demands such an attitude, the cost of the plan is a fair charge against the business * * *."

Since the early days of the Plan, however, the various Bell System Companies have issued many public statements, particularly in defending the cost of the Pension Plan as an item of operating expenses and, therefore, an item of cost to be borne by the telephone subscriber, emphasizing that the purpose of service pensions is to further the efficient and economical operation of the business. (See Proposed Report—Telephone Investigation (pursuant to Public Resolution No. 8, 74th Congress), p. 532.)

Donald R. Belcher, then Assistant Chief Statistician of the American Telephone and Telegraph Company, testified as follows before the Wisconsin Tax Commission on November 15, 1935:

> "I understand the fundamental purpose of the plan is to serve as an aid to the management in building up and maintaining an efficient personnel organization. * * * Every employer of labor, particularly every large employer, is faced with what we may call a superannuation problem. As employees grow old they gradually decline in efficiency and ability to render effective service. When an employee has reached the stage where, by reason of age or other disability, he is no longer able to render effective service, the company is then faced with the alternative of either releasing him at that time, or of carrying him on the payroll at a rate of pay which cannot be justified by the services which he can then perform. In the absence of a plan for the retirement of these employees—a plan that provides some reasonable old-age income—the company is very likely to, and I think in most cases does, retain such

employees on the payroll after the rate of pay they have been receiving is no longer fully earned. In other words, such a company has a concealed superannuation cost arising out of this delay in retirement of employees who ought to be released."

Finally, in a statement presented by Keith S. McHugh, then vice-president of the American Telephone and Telegraph Company, before the Committee on Ways and Means, House of Representatives, 1942, on behalf of the Bell System Companies concerning the Treasury proposal regarding the requirements to be met by pension trusts to retain their tax exempt statuses, he said as follows:

"The purpose of the plan is to provide for the orderly retirement of those who have become superannuated after long years of service and whose retention in the business would involve substantial additional expense and have a retarding influence on effective operation."

• • • • • •

"Our pension plan is not a savings plan, but is designed solely to meet the problem of superannuation in the business. Its advantage to the business lies in the fact that men and women can be retired for the good of the business. At the same time, the morale of the whole business is maintained, since those retired receive a pension after retirement *commensurate with their way of life before retirement.*" (Italics supplied.)

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"Pensions having a reasonable relation to pay at the time of retirement are paid as the only practical means of implementing the compulsory 65 year retirement rule. Many men who retire at 65 after long years of service are in good health and the Company would have little ground for retiring them unless such a pension is paid. By this means, super-

> annuated executives are gotten out of the business and the top organization is kept vitalized and efficient."

In the light of the public positions taken by Bell System spokesmen, the deduction of part of the OASI benefits from the Company's pension payments to its over-age employees results in nothing more nor less than the Bell System getting a windfall from the Government at the expense of the aged needy. The "simple justice" of the Company's pension plan becomes cruel hypocrisy in the face of the inordinate hardship imposed thereby.

Even before the Bell System revealed its determination to take full advantage of Social Security payments, as well as increases thereof initated by Congress in order to take care of cost of living rises, the Proposed Report of the Telephone Investigation included, in 1937 (p. 556), the following:

> "In view of the many discretionary features of the plan, such as the relatively small chance employees have of qualifying for pension benefits and the rights reserved by the companies to reduce benefits or cancel the whole plan, and the payment of large executive pensions, it is questionable whether the pension plan has equitably fulfilled its purposes, to the extent that those purposes have been accomplished."

POINT III.

The Bell System Pension Plan is designed to supplement and not to be offset by Social Security benefits.

In 1942, the Bell System pension, like other industrial pensions, faced a series of tax regulations which were designed to nullify the employees' pension trusts of many important companies.

On April 10, 1942, Mr. Keith S. McHugh, vice-president of the American Telephone and Telegraph Company, imposed upon Congress by giving testimony in such a way as to give it the impression that the Bell System pension plan was intended to supplement Social Security benefits rather than feed upon them. The following is a transcript taken from page 2422 of Volume 3 of the Hearings before the House Committee on Ways and Means (77th Congress, April 10, 1942):

> "Mr. Dingell (Rep., Michigan): One question I would like to ask you is about Federal Social Security annuity plan. That supplements your present plan, does it not?
>
> Mr. McHugh (Vice-Pres., A. T. & T., testifying for the company): Yes.
>
> Mr. Dingell: In other words, you have both now.
>
> Mr. McHugh: That is right.
>
> Mr. Dingell: I wanted to clarify that for the record, although I was quite convinced that there was no exemption.
>
> Mr. McHugh: That is right."

The decision below permits respondents to do precisely the opposite of what they so solemnly represented to Congress they would do.

POINT IV.

Deduction of Social Security benefits from pension allowances unjustly enriches Bell System companies at the expense of employee pensioners.

Pension payments to retired employees must of necessity be considered as additional compensation and not as gratuities. Otherwise, accruals would not be chargeable to operating expenses. Such concept was recognized by N. T. Guernsey, vice-president and general counsel of the American Telephone and Telegraph Company, in 1925, when consideration was being given to the adoption of the accrual method. He said:

> "In the final analysis the pension is a part of the compensation which the employee receives for his services, so that it is sound accounting to charge the expense on account of it to operating expenses during the service life" (Proposed Report—Telephone Investigation, pursuant to Public Resolution No. 8, 74th Congress, p. 551).

In the case of *Inland Steel Company* v. *NLRB,* 170 F. 2d 24 (C. A. 7), cert. denied by U. S. Supreme Court on April 25, 1945, the Court ruled that pension plans are a proper subject for collective bargaining because pensions are a form of wages.

Regulatory bodies have specifically concluded that Bell System pensions were additional but deferred compensation to its employees (see *Wisconsin Telephone Company,* P. U. R. 1932 D, 173).

Telephone workers have been obliged to accept wage increases which have lagged behind industry generally. They have dropped from one of the highest rungs on the

wage ladder to one of the lowest. They have been obliged to accept a lesser weekly wage in order to ultimately get the "pot of gold" which the companies presumably stored up for them at the end of the job rainbow.

These companies are therefore engaging in a monstrously callous procedure when they exact from employees one-half of the OASI benefits before paying the deferred wages owing to and earned by such employees.

When the Social Security Law was amended so as to increase benefits in order to keep up with the substantial rise in the cost of living, the Bell System took full advantage of it by depriving its employees of one-half of the increase in such benefits. When the Social Security Law was again amended recently in order to make it possible for women to obtain such benefits at age 62 instead of 65, the Bell System again took advantage of the change. And now that permanently disabled people can obtain Social Security benefits at age 50, the largest corporation in the world is proceeding to take away from such disabled persons one-half of the Social Security allowances, although the companies will no longer make contributions to the Social Security fund of such disabled persons when they reach the age of 50. Before the Law was amended, these companies were obliged to continue to make such contributions until the employees reached age 65.

The Bell System practices with respect to Social Security deductions from pensions may well be compared with the revelations incorporated in the Proposed Report—Telephone Investigation, pursuant to Public Resolution No. 8, 74th Congress, which showed that the Bell System Companies had borrowed practically all the pension funds set aside to meet service pension payments and had used them for corporate purposes (p. 559). At the present time, close to $300,000,000 of the Bell System Pension Trust Funds

represent investments in the bonds of Bell System Companies. These bonds pay an average return slightly in excess of 3%. The American Telephone and Telegraph Company is still loaning money to its associated companies at a rate of at least 6%. The Bell System Companies are still earning 6% or more by way of return on telephone plant.

The generous manner in which the Bell System has taken care of itself through its exclusive control of Bell System Pension Funds, as compared with the wholly inconsiderate and unjust treatment accorded Bell System pensioners through the deduction of Social Security allowances, has social significance which transcends the legal problems presented by this case.

Bell System Companies have employed several million women since 1913, when the Pension Plan was initiated, less than 2% of whom actually achieved pension status, as compared with over 50% of the Company executives who, for one reason or another, have been able to survive long enough to reach retirement age. These executives are favored in the Bell System Pension scheme of things on account of long terms of service and steeper salary trends during the ten year period which determines the amount of the pension. For example, as appears in the Proposed Report—Telephone Investigation, pursuant to Public Resolution No. 8, 74th Congress, p. 548:

> "The General Department of the American Co. paid $1,985,654 to 118 pensioners during the years 1913 to 1934, inclusive. Ten executives received $931,209, or 47 percent of the total."

These figures point up the enormity of the oppression resulting from the Social Security deductions.

POINT V.

The ever increasing number of older persons in present day society accentuates the need for both adequate social security payments and reasonable pension coverage.

A former president of the American Telephone and Telegraph Company now receives under the Bell System Pension Plan $91,700 a year. The Social Security deduction in his case represents considerably less than 1% of what he receives. In the case of the vast majority of the non-supervisory employees of the Bell System Companies, the Social Security deduction represents from 30% to 40% of the pension allowance.

The social implications of such a setup are underscored and emphasized in the light of the startling and far-reaching age composition changes that have been taking place in the last fifty years. During that time, the population of the United States doubled, but the number of persons past age 65 has quadrupled.

In 1900, the proportion of men and women 65 years of age and over in our total population was 1 in 25. Today it is 1 in 12, and steadily increasing—all attributable to the control of infectious diseases, advances in the fields of accident prevention and medical care and the general rise in the standards of living (Fact Book on Aging, Federal Security Administration, Committee on Aging and Geriatrics, 1952, page 4, Government Printing Office).

We cannot, therefore, shut our eyes to the increasing need for both government and private provision for the rapidly rising number of older people in our community.

Bell System intransigence, particularly in view of Congressional preoccupation with the problem of caring for

the aged, should certainly not have been given the imprimatur of judicial approval in the light of the record in this case.

Conclusion.

For the foregoing reasons, we join the petitioners in requesting this Honorable Court to grant the petition for rehearing and to grant a writ of certiorari or, in the alternative, remand this Cause for a Hearing *en banc* under Section 46(c) U. S. C. for an independent determination by the Court of Appeals of the issues in this Cause.

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